MISSISSIPPI LAW JOURNAL

TRIBUTE TO JOHN MINOR WISDOM

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TRIBUTE TO JOHN MINOR WISDOM

JOHN WISDOM, WATCHMAN OF THE REPUBLIC, FORESTER OF THE SOUL

Barry Sullivan[*]

> MENO. Can you tell me Socrates – is virtue something that can be taught? Or does it come by practice? Or is it neither teaching nor practice that gives it to a man but natural aptitude or something else?
>
> Plato, *The Meno*[1]

John Minor Wisdom was born in New Orleans on May 17, 1905. He graduated in 1925 from Washington and Lee University, where his father had been a student during the presidency of General Robert E. Lee.[2] Having taken all the courses in

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[*] Professor of Law, Washington and Lee University. A.B. 1970, Middlebury College; J.D. 1974, University of Chicago. Law Clerk to Judge Wisdom, 1974-75.

[1] Plato, *The Meno in* PLATO, MENO AND PROTAGORAS 115 (W. K. C. Guthrie ed., 1956).

[2] *See* Barry Sullivan, *To See Life Steadily and To See It Whole: For Judge Wisdom in His Ninety-First Year*, 53 WASH. & LEE L. REV. 3 (1996). When Judge

English literature then offered at Washington and Lee, John Wisdom continued his studies in that field during a postgraduate year at Harvard University. He returned to New Orleans, graduated from the Tulane Law School, and commenced the practice of law in New Orleans in 1929. John Wisdom and Bonnie Stewart Mathews were married on October 24, 1931.

John Wisdom left a growing law practice to join the armed forces during the Second World War. He served to the rank of Lieutenant Colonel in the Army Air Forces and thereafter resumed the practice of law in New Orleans. Concerned since his school days with the evils that come from absolute domination by one political party, he became active in Republican politics. In 1957, President Dwight D. Eisenhower appointed him to serve as a judge of the United States Court of Appeals for the Fifth Circuit.[3] He would later undertake additional judicial

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Wisdom delivered the Law School Commencement Address at Washington and Lee in 1995, he began his talk by speaking extemporaneously about some of his family's many connections with the University. Those remarks previously have been recounted:

> Judge Wisdom spoke of his father, Mortimer Wisdom, who studied at Washington College during the presidency of General Lee, marched in General Lee's funeral procession, graduated with the Class of 1871, and later served as a Trustee of the University. Judge Wisdom also recalled memories of his childhood in New Orleans, particularly of those occasions when his father's college friends, many of whom had served under General Lee's command, would spend the evening sharing reminiscences about General Lee and the War in the parlor of the Wisdom house.

Id. at 4. *See also* John Minor Wisdom, Plessy v. Ferguson*–100 Years Later*, 53 WASH. & LEE L. REV. 9 n.** (1996); *Law Commencement: Lee, Brown, and Plessy*, WASHINGTON & LEE ALUMNI MAGAZINE, Summer 1995, at 5-6.

[3] *See, e.g.,* DEBORAH J. BARROW AND THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 23-26 (1988); JACK BASS, UNLIKELY HEROES 44-46 (1981); FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 54-56 (1978). Herbert Brownell, Attorney General in the administration of President Dwight D. Eisenhower, recalled in a 1994 lecture at the Tulane Law School that "the [judicial] candidates recommended to the President by southern Senators during this period almost always had a public record of being opposed to desegregation" and that the Justice Department therefore "often made recommendations to the President for judicial positions in the southern states without senatorial support." Herbert Brownell, *Civil Rights in the 1950s*, 69 TUL. L. REV. 781, 788 (1995). Commenting on Judge Wisdom's appointment, Brownell continued:

responsibilities as a member of the Special Court under the Regional Rail Reorganization Act, the blue-ribbon judicial panel created to oversee the reorganization of the northeastern railroads,[4] and as Chairman of the Judicial Panel on Multidistrict Litigation.[5] He served as a judge of the Fifth Circuit until his death in New Orleans on May 15, 1999.

These are the basic facts pertaining to the life of Judge John Minor Wisdom. One could elaborate upon them, of course, in many ways. His father died when he was very young. As a youth, he learned the great Greek and Irish myths; he came to love the stories of those myths, and the just deeds of their heroes he could recite to the end of his life. He attended the Isidore Newman School in New Orleans and matriculated at Washington and Lee at a very young age. His studies at Harvard included work with the legendary Bliss Perry, and he reportedly vied for top grades in Perry's classes with the Afri-

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> The third member of this quartet was the distinguished citizen John Minor Wisdom, then a nationally-known New Orleans attorney. The Wisdom appointment was especially significant in signaling the administration's commitment to enforcing desegregation. Judge Wisdom was selected in preference to another aspirant, Governor Kennon of Louisiana, a respected Democrat who had backed Eisenhower for president but remained a staunch segregationist.

Id. See also HERBERT BROWNELL WITH JOHN P. BURKE, ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL 182 (1993). At this distance in time, it is almost impossible to imagine the fortitude that was then required to speak in favor of desegregation. By the late 1950s, as the historian C. Vann Woodward has said, "A 'moderate' [had become] a man who dared open his mouth, an 'extremist' one who favored eventual compliance with the law, and 'compliance' took on the connotations of treason." C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 166 (3d ed. 1974). Celestine Sibley, the longtime Atlanta newspaper columnist, wrote in a 1990 column about the movie "Driving Miss Daisy" that inaction in the face of criticism "'was an Atlanta attitude of the time, and many Atlantans took it like Miss Daisy, listening and looking at the empty chair beside her where her black servant and best friend, Hoke, should have been sitting if her courage had matched her good will'." Felicity Barringer, *Celestine Sibley is Dead at 85; Columnist Embodied the South*, N.Y. TIMES, Aug. 17, 1999, at C21 (obituary).

[4] *See* 45 U.S.C. § 719(b) (1982) (repealed). *See also* Henry J. Friendly, *From a Fellow Worker on the Railroads*, 60 TUL. L. REV. 244 (1985); John Minor Wisdom, *Views of a Friendly Observer,* 133 U. PA. L. REV. 63 (1984).

[5] *See* 28 U.S.C. § 1407 (1993).

can-American poet Countee Cullen.[6] When he turned his attention to the study of law, he likewise achieved distinction, leading his class academically at the Tulane Law School.

Before the War, John Wisdom became an acknowledged expert on the law of trusts, and it was largely through his efforts that the concept of the trust, a creature of the common law, was introduced into the civil law system of Louisiana.[7] He also established his credentials as a law teacher, and as a scholar of the civil law. Virtually from the time he graduated from Tulane until his appointment to the federal bench, John Wisdom served as a part-time professor of law at Tulane, teaching courses on the Louisiana Civil Code and the law of trusts, even as he and Saul Stone, his friend and Tulane classmate, saw their law practice grow from a two-person office into one of New Orleans' preeminent law firms. In 1941, he was elected to membership in the American Law Institute, an institution to which he would devote much time and energy for the rest of his life.

Most worthy of elaboration, perhaps, is the happy fact of his marriage in 1931 to Bonnie Stewart Mathews. Bonnie had grown up on a sugar plantation and was educated at home before attending Sweet Briar College. John Wisdom and Bonnie shared a keen interest in history, literature, music and the arts, an active and genuine commitment to the responsibilities of citizenship in a democratic society, and an abiding interest in politics and public affairs. The great-granddaughter of George Mathews, another legendary Louisiana judge, she is a person of strong intellect, deep conviction, outspoken opinion, and stubborn courage.[8] Like John Wisdom, she also has been

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[6] BASS, *supra* note 3, at 47.

[7] *See, e.g.,* John Minor Wisdom, *Progress in the Codification of Trusts,* 14 TUL. L. REV. 165 (1940); John Minor Wisdom, *A Trust Code in the Civil Law Based on the Restatement and Uniform Acts: The Louisiana Trust Estates Act,* 13 TUL. L. REV. 70 (1938). It would be impossible to pass by these two important articles without acknowledging the extent to which they reflect the distinctive voice of their author:

> If there is anything more interesting than that famous chapter on snakes in the Complete History of Ireland, it is a trust code in a civil law jurisdiction. To the tightly logical civilian mind, regardless of the number of angels that may dance on the point of a needle, two persons cannot occupy the same point at the same time, and there cannot be two owners, legal and equitable, of the same property.

Id. See also Max Nathan, Jr., *Tribute to Judge John Minor Wisdom,* 69 TUL. L. REV. 1431, 1432-34 (1995).

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[8] Reflecting on their marriage, Judge Wisdom was fond of observing: "Sixty-seven years of marriage, and never a peaceful moment." Mrs. Wisdom would respond on cue: "Peaceful is boring." Peaceful or not, their partnership was an extraordinary one. The rebirth of the Republican party in Louisiana was as much her project as his. Nearly a half century later, she would recall with enthusiasm "making her rounds through the various suites in [the 1952 convention hotel] searching for delegates who she could swing over to the Eisenhower camp," and being stopped by the "mellifluous voice" of General MacArthur wafting over the transom of his hotel room, as he practiced the acceptance speech he planned to give to a deadlocked convention. Joel William Friedman, *Judge Wisdom and the 1952 Republican National Convention: Ensuring Victory for Eisenhower and a Two-Party System for Louisiana*, 53 WASH. & LEE L. REV. 33, 69 (1996). In addition to their work together in Louisiana politics, Bonnie Wisdom worked on civic projects in New Orleans and Washington. She also has devoted herself to the serious study of Elizabethan drama and French literature, the latter being read in the original and discussed in French with her New Orleans reading group. Her deep interest in Shakespeare translated into activism on behalf of the Folger Library, and her interest in literature and history once led her to track down the source of Justice John Marshall Harlan's famous assertion that the Constitution "is color-blind, and neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). In his brief for the plaintiffs, Albion Winegar Tourgée wrote: "Justice is pictured blind and her daughter, the Law, ought at least to be color-blind." Bonnie Wisdom discovered that Tourgée, who was a novelist as well as a lawyer, had earlier put those words into the mouth of one of his characters. *See* Wisdom, Plessy v. Ferguson, *supra* note 2, at 11. As Bonnie Wisdom put it, "I discovered that Tourgée, like Mozart, was simply repeating himself." *Id.* (quoting BONNIE WISDOM, THE CRUSADING CARPETBAGGER 25 (unpublished manuscript)). *See also* Owen Fiss, *The Troubled Beginnings of the Modern State, 1888-1910*, *in* 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 354 n.10 (1993). Some of Judge Wisdom's opinions have been characterized as creating "an alternative history of Louisiana." *See, e.g.,* Barry Sullivan, *The Honest Muse: Judge Wisdom and the Uses of History,* 60 TUL. L. REV. 314, 341 (1985). If so, Bonnie Wisdom's great-grandfather, George Mathews, would be a fine character for such a history:

> George Mathews, presiding justice of the Louisiana Supreme Court, had issued one of the most remarkable rulings in the history of black-white relationships. A free woman of color had sued for the freedom of her daughter, Josephine, who had been born a slave. Josephine's owners had taken her with them to France, where slavery was outlawed, and returned with her to Louisiana. Justice Mathews had upheld the decision

blessed with an extraordinary sense of humor and a finely developed appreciation of irony.

During the Second World War, John and Bonnie Wisdom moved their growing family to Washington, where John Wisdom served first in the Operational Intelligence Division and then in the now-legendary unit known as "the Legal Branch." That was the shorthand expression for the Legal Branch of the Contract Division at the Pentagon. Benjamin Kaplan, a member of the unit who would later become a professor at the Harvard Law School and an Associate Justice of the Supreme Judicial Court of Massachusetts, has described the Legal Branch as "the best collection of lawyers I've ever seen."[9] As Jack Bass has noted, "Most of them were graduates of Harvard or other Ivy League law schools and already had established themselves with large eastern law firms."[10] In any event, they included numerous lawyers who would attain positions of great prominence as lawyers, law teachers, judges, public servants, and leaders of the bar in the post-war period.[11] John Wisdom's

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> of the jury to free the child, declaring, "Being free for one moment in France, it was not in the power of her former owner to reduce her again to slavery."

CAROLE FLAKE, NEW ORLEANS: BEHIND THE MASKS OF AMERICA'S MOST EXOTIC CITY 223-24 (1993). *See also* Marie Louise v. Marot, 9 La. 473 (1836).

[9] BASS, *supra* note 3, at 48.

[10] *Id.* at 49. With characteristic modesty, Judge Wisdom often commented that "[m]y little feet had to run fast to try to keep up with them, I can tell you." *Id.*

[11] *See, e.g.,* Herbert P. Wilkins, *R. Ammi Cutter, in* MINUTES IN REMEMBRANCE, 1976-1997, 108, 109 (American Law Inst. 1998). Justice Wilkins wrote:

> The Legal Branch dealt with a great variety of legal staff work and had a roving commission to confront problems affecting procurement and production. [Justice Ammi Cutter], who served until October 1944, . . . was a significant force in assembling there a remarkable group of outstanding lawyers. Among that group were Benjamin Kaplan of New York, subsequently a Professor of Law at the Harvard Law School and Ammi's successor as an Associate Justice of the Massachusetts Supreme Judicial Court; Robert R. Bowie of Baltimore, later a Professor of Law at the Harvard Law School and international law expert; Oscar H. Davis of New York, subsequently First Assistant Solicitor General and Judge of the United States Court of Claims; and future Institute Council members John Minor Wisdom of New Orleans, William L. Marbury of Baltimore, Joseph E. Johnston of Birmingham, Charles H. Willard of New York,

work with the Legal Branch earned him the Legion of Merit.

Following the War, John and Bonnie Wisdom raised their three children in New Orleans. John Wisdom resumed his law practice and part-time law teaching, argued an important case in the Supreme Court of the United States,[12] and became an acknowledged leader of the New Orleans and national bars. In addition, he and Bonnie took on the project of breathing life into the Republican Party in Louisiana, which they proceeded to rebuild from the ground up. With Elbert Tuttle[13] and others, John Wisdom worked at making the moderate wing of the Republican Party a significant force across the southern states. His masterly representation of the pro-Eisenhower Louisiana delegation at the 1952 Republican Convention was closely studied by historians and political scientists, as well as by politicians eager to emulate his winning strategies.[14] He became the Republican National Committeeman for Louisiana and

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> Arthur Dixon of Chicago, H. Chapman Rose of Cleveland, and Dillon Anderson of Houston.

Id.

[12] *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

[13] Elbert Tuttle had a role in building the Republican Party in Georgia similar to that which John Wisdom undertook in Louisiana. He was appointed to the Fifth Circuit in 1954 and served as Chief Judge from 1961 until 1967. *See* Arthur H. Dean, *An Appreciation of Judge Elbert Parr Tuttle*, 53 CORNELL L. REV. 1 (1967).

[14] *See, e.g.*, PAUL T. DAVID, RALPH M. GOLDMAN & RICHARD C. BAIN, THE POLITICS OF NATIONAL PARTY CONVENTIONS 262-64 (1960); PRESIDENTIAL NOMINATING POLITICS IN 1952: THE SOUTH 265-90 (Paul T. David, Malcolm Moos, & Ralph M. Goldman eds., 1954); PRESIDENTIAL NOMINATING POLITICS IN 1952: THE NATIONAL STORY 68-90 (Paul T. David, Malcolm Moos & Ralph M. Goldman eds., 1954); EUGENE H. ROSEBOOM AND ALFRED E. ECKES, JR., A HISTORY OF PRESIDENTIAL ELECTIONS: FROM GEORGE WASHINGTON TO JIMMY CARTER 219-21 (4th ed. 1979); Joel William Friedman, *Judge Wisdom and the 1952 Republican National Convention: Ensuring Victory for Eisenhower and a Two-Party System for Louisiana*, 53 WASH. & LEE L. REV. 33 (1996); Joel William Friedman, *John Minor Wisdom's Battle Against the Political Bosses to Create a Two-Party System in Louisiana*, 69 TUL. L. REV. 1439 (1995). *See also* BROWNELL WITH BURKE, *supra* note 3, at 105-22; NICOL C. RAE, THE DECLINE AND FALL OF THE LIBERAL REPUBLICANS FROM 1952 TO THE PRESENT 37-39 (1989). *See also* Cornelius P. Cotter, *Eisenhower as Party Leader*, 98 POL. SCI. Q. 255, 277 (1983) (discussing Wisdom's leadership of "Committee of Southerners" during early days of Eisenhower Administration).

served on the President's Commission on Government Contracts, which was concerned with discrimination by government contractors. Under the leadership of John Wisdom, the Republican party in Louisiana carried the state for President Eisenhower in 1956, putting Louisiana in the Republican column for the first time since Reconstruction.[15] John Wisdom also served as President of the New Orleans Council of Social Agencies and was a director of the New Orleans Urban League.[16] Like his father, he was elected to the board of trustees of Washington and Lee University. His forty-ninth birthday, on May 17, 1954, coincided with the Supreme Court's decision in *Brown v. Board of Education.*[17]

Elbert Tuttle, John Wisdom's friend and co-worker in Republican politics, reportedly joked at the time of his own appointment to the court of appeals that he was going to "retire" to a seat on the Fifth Circuit.[18] Whatever might have been the possibility of that happening at some other time, it was not to be the case for Judge Tuttle or for any of the other judges who served on the Fifth Circuit during that period.[19] In the aftermath of the *Brown* decision, they were confronted on an almost daily basis with the most vexing questions of constitutional and civil rights law. The most difficult of those questions often involved issues of enforcement and problems of fashioning appropriate and effective remedies in the face of longstanding practices and structural arrangements that no longer passed constitutional muster.[20] There would be no retirement for Elbert Tuttle, just as there had been no retirement for Richard T. Rives,[21] who preceded him to the Fifth Circuit, or for John R. Brown[22] or for John Minor Wisdom, who would come a short time later.

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[15] *See* Friedman, *Ensuring Victory for Eisenhower*, *supra* note 14, at 96-97.

[16] *See, e.g.,* READ & MCGOUGH, *supra* note 3, at 54-56.

[17] 347 U.S. 483 (1954).

[18] *See, e.g.,* BASS, *supra* note 3, at 15.

[19] In a 1967 tribute to Judge Tuttle, Judge Wisdom wrote:

> Judge Tuttle's judicial career has coincided with the Negroes' march toward equality that began with the *School Segregation Cases*. He was appointed to the court only a few months after the Supreme Court decided the first *Brown* case in May 1954. Since then, day in and day out, Judge Tuttle has lived with civil rights problems. So have we all. But he has been responsible for shepherding a court of very unsheeplike judges at a time of social ferment, when the court, as an institution, was exposed to the severe stresses and strains produced by civil rights litigation.

John Minor Wisdom, *Chief Judge Tuttle and the Fifth Circuit,* 53 CORNELL L. REV. 6, 7 (1967) (footnote omitted).

When John Wisdom joined the court in 1957, he quickly established himself as its intellectual leader and as a penman of the first rank. There was much work to be done, and he soon proved equal to the task. It was his mind and pen that crafted the opinions in *Meredith v. Fair*,[23] where the court ordered the admission of James Meredith to the University of Mississippi, and it was he who brought down the so-called "interpretation test," the "wall [that stood] in Louisiana between registered voters and unregistered, eligible Negro voters."[24] In the contempt case against Mississippi Governor Ross Barnett that came out of the *Meredith* litigation, Judge Wisdom suggested that the battle over Governor Barnett's theories about federalism should have been waged as a "duel with drawn pencils . . . in the Mississippi Law Journal," rather than as a pitched battle "in the streets of Oxford and on the campus of the University."[25] When a majority of the *en banc* court decided that the contempt proceedings should be terminated, he thought that that result trivialized "[t]he serious threat Governor Barnett posed . . . to the constitutional relationship of the States to the National Government."[26] He added: "A public wrong of such enormity carries with it a corresponding and unshirkable duty on the federal court to vindicate the rights of the Nation by bringing the alleged contemnor to trial."[27]

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[20] *See, e.g.*, J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961). *See also* OWEN FISS, THE CIVIL RIGHTS INJUNCTION (1978); John Minor Wisdom, *The Frictionmaking, Exacerbating Political Role of Federal Courts*, 21 SW. L.J. 411, 424 (1967); John Minor Wisdom, *A Southern Judge Looks at Civil Rights*, 42 F.R.D. 437, 453 (1966); Note, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90 (1963).

[21] *See* BASS, *supra* note 3, at 69-74.

[22] *See id.* at 101-05.

[23] *See* Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962) (Wisdom, J.) (affirming district court's denial of mandatory preliminary injunction requiring admission of James Meredith to University of Mississippi); Meredith v Fair, 305 F.2d 341 (5th Cir. 1962) (per curiam) (denying injunction pending appeal); Meredith v. Fair, 305 F.2d 343 (5th Cir. 1962) (Wisdom, J.) (reversing final judgment of district court denying permanent injunction, with instructions that district court issue mandatory injunction requiring Meredith's admission), *cert. denied*, 371 U.S. 828 (1962); Meredith v. Fair, 306 F.2d 374 (5th Cir. 1962) (reissuing earlier mandate to district court that an injunction be issued requiring Meredith's admission). *See also* JAMES W. SILVER, MISSISSIPPI: THE CLOSED SOCIETY (1964).

[24] United States v. Louisiana, 225 F. Supp. 353, 355 (E.D. La. 1963) (three-judge court), *aff'd*, 380 U.S. 145 (1965). *See also* Philip P. Frickey, *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 TUL. L. REV. 276 (1985).

In *United States v. City of Jackson*,[28] Judge Wisdom wrote for the court in desegregating the interstate bus and rail terminals of Jackson, Mississippi, and he boldly declared in *United States v. Jefferson County Board of Education*[29] that the "*only school desegregation plan that meets constitutional standards is one that works.*"[30] In *United States v. Cox*[31] and *Labat v.*

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[25] United States v. Barnett, 346 F.2d 99, 107 (5th Cir. 1965). Instead, as Judge Wisdom pointed out, "Ross Barnett, as head of the State of Mississippi, mobilized sheriffs, highway troopers, and local police officers *and by force of arms overcame United States marshals enforcing the law.*" *Barnett*, 346 F.2d at 107 (emphasis in original; footnote omitted). Barnett required the executive branch of the federal government "[t]o win this battle [by deploying] more soldiers under arms at Oxford, Mississippi, or held close by in reserve, than George Washington in the Revolutionary War ever commanded at one time." *Id.* at 109.

[26] *Id.* at 107.

[27] *Id.* Judge Wisdom concluded his opinion with these observations: "There is an unedifying moral to be drawn from this case of The Man in High Office Who Defied the Nation: The mills of the law grind slowly—but not inexorably. If they grind slowly enough, they may even come, unaccountably, to a gradual stop, short of the trial and judgment an ordinary citizen expects when accused of criminal contempt. There is just one compensating thought: Hubris is grist for other mills, which grind exceeding small and sure." *Id.* at 109.

[28] 318 F.2d 1 (5th Cir. 1963).

[29] 372 F.2d 836 (5th Cir. 1966), *modified on reh'g*, 380 F.2d 385 (5th Cir. 1967) (en banc) (per curiam), *cert. denied*, 389 U.S. 840 (1967). In that opinion, Judge Wisdom also wrote: "The clock has ticked the last tick for tokenism and delay in the name of 'deliberate speed.'" *Jefferson County*, 372 F.2d at 896. *See also* Singleton v. Jackson Mun. Sch. Dist., 384 F.2d 729 (5th Cir. 1965). Dean Frank T. Read has written that "[n]o judge in America has contributed more to the evolution of school desegregation law than John Minor Wisdom." Frank T. Read, *The Penman of the Court: A Tribute to John Minor Wisdom*, 60 TUL. L. REV. 264, 271 (1985).

[30] *Jefferson County Bd. of Educ.*, 372 F.2d at 847 (emphasis in original).

[31] 342 F.2d 167, 185 (5th Cir.) (en banc) (Wisdom, J., concurring), *cert. denied*,

Bennett,[32] he wrote two important opinions about grand and petit juries, and his opinion in *Local 189, United Papermakers and Paperworkers v. United States*[33] established the important principle of "rightful place" in employment discrimination litigation, thereby answering "one of the most perplexing issues . . . under Title VII: how to reconcile equal employment opportunity *today* with seniority expectations based on *yesterday's* built-in racial discrimination."[34] In *Dombrowski v. Pfister*,[35] *Weber v. Kaiser Aluminum & Chemical Corp.*,[36] and *Cipriano v. City of Houma*,[37] Judge Wisdom's dissents foreshadowed reversals by the Supreme Court. He was, as Judge Alvin B. Rubin has written, "the defender of the Constitution, indeed the watchman of the Republic. . . ."[38]

Although Judge Wisdom's civil rights opinions were widely and justly admired for their courage, grace, and intellectual power, they did not by any means account for the majority of his work product. From antitrust to securities regulation, and from admiralty to tax, Judge Wisdom wrote insightful and scholarly opinions in virtually every area of law known to the federal courts.[39] For example, his articulation of the ancient

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381 U.S. 935 (1965).

[32] 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967).

[33] 416 F.2d 980, 982-83 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[34] *Local 189*, 416 F.2d at 982-83 (emphasis in original) (footnote omitted). *See also* 42 U.S.C. § 2000e (1994).

[35] 227 F. Supp. 556, 569 (E.D. La. 1964) (three-judge court) (Wisdom, J., dissenting), *rev'd* 380 U.S. 479 (1965).

[36] 563 F.2d 216, 227 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd sub nom.* United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

[37] 286 F. Supp. 823, 828 (E.D. La. 1968) (three-judge court) (Wisdom, J., dissenting), *rev'd*, 395 U.S. 701 (1969).

[38] Alvin B. Rubin, *John Is Every Inch a Sailor*, 60 TUL. L. REV. 256, 260 (1985).

[39] In 1967, Judge Wisdom wrote:

> Contrary to common opinion, the civil rights movement is not primarily responsible for the great surge of litigation in our circuit. The three basic causes are: (1) the growth of industry and population in Texas, Florida, Georgia, and Louisiana, and, to a lesser extent, in Alabama and Mississippi; (2) the general increase in federal question litigation; and (3) the recent influx of post-conviction appeals.

Wisdom, *supra* note 19, at 7. *See also* Harvey Couch, *A Small Sampling of Judge* documents exception to the rule against hearsay in *Dallas County v. Commercial Union Assurance Co.*[40] was adopted by the drafters of the Federal Rules of Evidence,[41] and his opinion in *Bossier Parish School Board v. Lemon*,[42] which upheld the existence of a private right of action under Title VI of the Civil Rights Act of 1964,[43] proved persuasive to the Supreme Court, when it upheld the availability of a private right of action under Title IX of the Education Amendments of 1972[44] in *Cannon v. University of Chicago*.[45] He also wrote important decisions on the right to treatment,[46] the privilege against self-incrimination,[47] and the duty to warn of asbestos dangers.[48] He wrote landmark opinions in admiralty, such as *Offshore Company v. Robison*,[49] employed his deep knowledge of the Louisiana Civil Code in diversity cases, and contributed, as a member of the Council of the American Law Institute, to the development of common law subjects.

In all his opinions, there is a strong sense of cutting to the heart of the matter. The prose style is spare and vigorous, and

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Wisdom's "Other" Opinions, 60 TUL. L. REV. 356 (1985).

[40] 286 F.2d 388 (5th Cir. 1961).

[41] FED. R. EVID. 803(16).

[42] 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

[43] 42 U.S.C. § 2000d *et seq.* (1994).

[44] 20 U.S.C. § 1681 (1990).

[45] 441 U.S. 677 (1979).

[46] Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated*, 422 U.S. 563 (1975).

[47] DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962).

[48] Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

[49] 266 F.2d 769 (5th Cir. 1959). In an article praising Judge Wisdom's admiralty opinions, his friend and colleague, Judge Alvin B. Rubin, once wrote:

> In every legal area to which he turned his attention, he contributed to the development of the law and to the search for justice under law, a search as important to those who come before the court to try personal injury cases as it is to those who invoke the Constitution. When we read only his admiralty opinions, however, we know that the protector of civil rights, the master of statutory interpretation, the defender of the Constitution, indeed the watchman of the Republic, was also proctor with the best of them.

Alvin B. Rubin, *John Is Every Inch a Sailor*, 60 TUL. L. REV. 256, 260 (1985).

the opinions march ineluctably to their respective conclusions. There is never any risk of oversimplifying, yet the essence of the problem is always and elegantly laid bare. There is a strong sense of the author's conviction and focus: that the law's purpose is to serve the needs of human life by dealing wisely and truthfully with them, and that law must therefore concentrate on the realm of the real, the place where the real problems of human life are to be worked out. There is high theory, of course, but the elegance of that theory is never an end in itself. Its justification always depends upon its capacity to capture and reflect and deal effectively with what is real. Likewise, there is no effort wasted on tangents, still less on that which is merely interesting. The central concern, as Yeats said, "is to hold in a single thought reality and justice."[50]

Late in his judicial career Judge Wisdom was presented with a case challenging the constitutionality of the Texas IOLTA scheme, which permits lawyer trust accounts to be bundled together, so that interest may be earned. The amounts earned in interest are used to help finance legal services for the poor. At the threshold, the court was required to decide whether the interest earned on these accounts gave rise to a property interest on the part of the lawyers' clients.[51] If so, the scheme necessarily would be subject to constitutional scrutiny. The end obviously was a laudable one, and it was one of which Judge Wisdom doubtless would have approved. Nonetheless, Judge Wisdom could not credit the argument on which the State sought to defend the scheme: that the interest did not amount to property because, in the absence of the scheme, the interest would not have been earned. For him, the fact was that the interest *had* been earned, and that defined the problem to be decided, not some hypothetical state of affairs that had not come to pass. In words that echo Parmenides and *King Lear*, Judge Wisdom addressed what he took to be the essence of the problem:

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[50] SEAMUS HEANEY, CREDITING POETRY 17 (1995).

[51] *See* Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996 (5th Cir. 1996), *aff'd,* 524 U.S. 156 (1998).

> It has been suggested that the IOLTA program represents a successful, modern-day attempt at alchemy. While legends abound concerning the ancient, self-professed alchemists who worked tirelessly towards their goal of changing ordinary metal into precious gold, modern society generally scoffs at this attempt to create "something from nothing". The defendants in this case denounce such skepticism, declaring that they have unlocked the magic that eluded the alchemists. The alchemists failed because the necessary ingredients for their magic did not exist in historical times: the combination of attorney's client funds and anomalies in modern banking regulations.[52]

Significantly, Judge Wisdom's final opinion for the *en banc* court, which was published only a few weeks before his death, involved a school desegregation case in which he had dissented from the original panel opinion.[53] When the original panel declined to reach the merits of the case on the ground that it was not yet ripe for decision, Judge Wisdom wrote that the case was "so bursting with over-ripeness that it emits an unpleasant odor."[54] In his dissent to the panel opinion, he virtually invited the filing of a petition for rehearing and suggestion of rehearing *en banc*. He wrote:

> The controlling fact, well known to Louisiana and this Court, is that the area covered by the ninth, tenth, and eleventh wards of the eleven wards in Rapides Parish is clearly defined as the predominantly white section of Alexandria. It is admittedly eighty-seven per cent white, and may be more. The proposed majority opinion is, therefore, a blatant attempt to establish a special public school district for whites in a limited area known as the white section of Alexandria. . . . It is incredible that half a century after *Brown*, one should have to ask for an en banc judgment to prevent the establishment of a school for whites in a public school system. That is neces-

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[52] *Washington Legal Found.*, 94 F.3d at 1000 (footnote omitted).

[53] Valley v. Rapides Parish Sch. Bd., 173 F.3d 944 (5th Cir. 1999) (en banc), *vacating*, 145 F.3d 329 (5th Cir. 1998).

[54] *Valley*, 145 F.3d at 334 (Wisdom, J., dissenting).

> sary in this case where ripeness "is a cape for unauthorized appellate rule making." Here, however, the cape has rubbed hard against the rock of controlling fact. The cape is in tatters.[55]

On rehearing *en banc*, Judge Wisdom wrote the opinion for a unanimous court. The case was reversed and remanded, but with instructions carefully crafted to ensure a speedy and appropriate resolution of the questions presented.

Judge Wisdom sat as a judge of the Fifth Circuit for forty-two years. He brought to the task of judging a prodigious intellect, a sure sense of history, a penchant for research, and a felicity of expression uncommon among lawyers and judges. Many have written about those qualities,[56] but an equally important quality was the boundless enthusiasm with which he addressed every task at hand. Indeed, in the last year of his life, when age and illness had left his body frail, his passion for the law was undiminished. When he spoke about a legal issue that he had found difficult or interesting, or a dissent he had written, his piercing blue eyes would become radiant. Nothing was old hat, and no law student ever found more joy in his work.

Of course, Judge Wisdom's work did not play to universal acclaim. In the 1950s and 1960s, when the court's assistance constantly was being sought by plaintiffs emboldened by *Brown* to insist on the dismantling of segregation in a myriad of areas,

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[55] *Id.* at 334-35 (citation omitted). Judge Wisdom concluded: "The majority's opinion, not the first submitted on the immediate issue, impels an en banc proceeding." *Id.* at 335.

[56] *See, e.g.*, BASS, *supra* note 3, at 56 (stating that Judge Wisdom's opinion in *United States v. Louisiana* "reads like a first-rate doctoral dissertation"); READ & MCGOUGH, *supra* note 3, at 57 (praising Judge Wisdom for "elevating the craft of judicial opinion-writing to an art form"); Philip P. Frickey, *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 TUL. L. REV. 276, 277 (1985) (stating that Judge Wisdom in *United States v. Louisiana* "used masterly judicial scholarship to achieve a goal of immense practical importance"); Elbert P. Tuttle, *Equality and the Vote*, 41 N.Y.U. L. REV. 245, 250-51 (1966) (stating that "[a]n excellent and very readable discussion of the use of the 'understanding' clause for the qualification of prospective voters can be found in the scholarly opinion of Judge John Minor Wisdom").

Judge Wisdom's efforts to follow the law caused him to be harassed, threatened, and vilified. His dogs were poisoned, rattlesnakes were thrown in his garden, abusive phone calls came throughout the night, and the daily mail often meant the delivery of crude and hate-filled letters.[57] Judge Wisdom undoubtedly took courage from the even greater risks and sacrifices by those who invoked the protection of the federal courts.[58] Perhaps he also took some comfort from the precept attributed to General Lee: "Do your duty in all things. You cannot do more. You should never do less."[59] In any event, he took this abuse with equanimity. As the New Orleans *Times-Picayune* said in a 1996 editorial, "While the turbulent civil rights era was a trying time for Judge Wisdom and his family, he took it in stride, reacting to the pressures of the moment with steadfastness and grace."[60]

On the other hand, many well-deserved honors came to him in later years. Eight colleges and universities, including each of the three he attended, conferred honorary degrees on him.[61] He served on several law school visiting committees, including those of Harvard and the University of Chicago. He served as Chair of the Appellate Judges Conference of the American Bar Association. The New Orleans *States Item* named Judge Wisdom the New Orleans Jurist of the Century in 1977. He and Judge Tuttle were jointly awarded the Edward J. Devitt Distinguished Service to Justice Award.[62] The Litigation Section of the American Bar Association created the John Minor Wisdom Award for Public Service and Professionalism and made the first award to him. The American Inns of Court Foundation conferred the Lewis F. Powell, Jr. Award for Professionalism and Ethics on him. Louisiana Public Broadcasting aptly recognized him as a "Louisiana Living Legend." The Tulane Law Review dedicated issues to him on three different occasions,[63] and the Washington and Lee Law Review honored him on his ninetieth birthday.[64]

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[57] READ & MCGOUGH, *supra* note 3, at 56-57.

[58] Judge Wisdom undoubtedly would have agreed with Professor Burke Marshall's observation that "those whose lives, personal safety, economic security, and futures were most at stake were not lawyers or judges at all; they were the plaintiffs in the lawsuits . . . and the participants in the civil rights movement, and they were mostly black." Burke Marshall, *Southern Judges in the Desegregation Struggle*, 95 HARV. L. REV. 1509, 1515 (1982) (book review). *See, e.g.*, SETH CAGIN, WE ARE NOT AFRAID: THE STORY OF GOODMAN, SCHWERMER, AND CHANEY AND THE CIVIL RIGHTS CAMPAIGN FOR MISSISSIPPI (1988); JOHN LEWIS,WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT (1988. *See also* Martin Luther King, Jr., *Letter from the Birmingham City Jail in* ROBERT A. GOLDWIN, ON CIVIL DISOBEDIENCE 65-66 (1970) ("Perhaps it is easy for those who have never felt the stinging darts of segregation to say, "Wait" . . . . There comes a time when the cup of endurance runs over, and men are no longer willing to be plunged into the abyss of despair.").

[59] *See* Sandra Day O'Connor, *A Tribute to Lewis F. Powell, Jr.*, 56 WASH. & LEE L. REV. 4, 6 (1999).

[60] *Judge Wisdom and His Times* (editorial), TIMES-PICAYUNE (New Orleans), Aug. 11, 1996, at B8. When Judge Wisdom received the Medal of Freedom in 1993, David Broder wrote about the occasion in his *Washington Post* column, noting, among other things, that "Wisdom roars with laughter, untainted by any show of bitterness, when he recalls how John N. Mitchell, Nixon's attorney general, dismissed a 1969 suggestion that Wisdom belonged on the Supreme Court by saying, 'He's a damned left-winger. He'd be as bad as Earl Warren.'" David S. Broder, *Wisdom for the Ages*, WASHINGTON POST, Dec. 8, 1993, at A23.

In the final years of his life, the greatest honors came to him. In 1993, President William Jefferson Clinton awarded the Medal of Freedom to Judge Wisdom, honoring him as "a son of the Old South who became an architect of the new South."[65] In 1994, the United States Court of Appeals Building in New

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[61] Oberlin College was the first to honor him in 1963. The last was Washington and Lee, which awarded him an honorary degree at a special convocation marking the 150th anniversary of the founding of the Law School in August 1998. In between, he was honored by Tulane University, the University of San Diego, Haverford College, Middlebury College, Harvard University, and Southern Methodist University.

[62] When he and Judge Tuttle received this honor in 1989, Judge Wisdom wryly explained the honor to his clerks by suggesting that the selection panel must have been interested mainly in longevity. That being the case, he said, Judge Tuttle and he were unbeatable at a combined age of 176.

[63] *See* Jerry A. Brown, *John Minor Wisdom: Reminiscences of an "Old" Law Clerk*, 69 TUL. L. REV. 1411 (1995); Barry Sullivan, *Dedication: For Judge Wisdom on His Eighty-Fifth Birthday*, 64 TUL. L. REV. 1341 (1990); Elbert Tuttle, *In Tribute to John Minor Wisdom: Foreword*, 60 TUL. L. REV. 231 (1985).

[64] *See* Barry Sullivan, *To See Life Steadily and To See It Whole: For Judge Wisdom in His Ninety-First Year*, 53 WASH. & LEE L. REV. 3 (1996).

[65] Ricki Tigert Helfer, *The Judge and Bonnie Wisdom: A Personal Tribute*, 69 TUL. L. REV. 1417 (1995).

Orleans was renamed by an Act of Congress as the John Minor Wisdom Court of Appeals Building.[66] In 1996, the American Bar Association conferred its highest award, the ABA Medal, on Judge Wisdom.[67] Shortly after his death, Chief Judge Carolyn Dineen King announced that Judge Wisdom's personal office would be preserved as he had left it and designated for the use of senior circuit judges sitting in New Orleans. In a different line of work, his number would have been retired.

The foregoing facts are indeed impressive. They give evidence of a singularly, perhaps uniquely, full and productive life. At the same time, they say too little about John Minor Wisdom, the man. Still less do they speak to the essence of why it was that Judge Wisdom inspired such love and admiration in all those who knew him. In an earlier tribute to the Judge, Justice William J. Brennan, Jr. assayed the relationship between Judge Wisdom's public record and his private virtues.[68]

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[66] *See Court Building Named For Wisdom*, TIMES-PICAYUNE (New Orleans), June 21, 1994, at B4. *See also* John Treadway, *Courthouse Name Honors Judge Wisdom*, TIMES-PICAYUNE (New Orleans), Sept. 11, 1993, at B1.

[67] *See Wisdom Garners ABA Medal: Association's highest honor is the latest in distinguished jurist's long career*, 82 A.B.A. J. 120 (Aug. 1996). Professor Charles Alan Wright, president of the American Law Institute, described the award ceremony in a memorandum to the members of the Council:

> A statement by the Board of Governors about the Medal says: "The American Bar Association Medal is rarely given, and then only to that person judged by the Board of Governors to have rendered exceptionally distinguished service to the cause of American jurisprudence." This year's recipient easily satisfied that test. It was our colleague John Minor Wisdom. At age 91 John is not as spry as he once was, but he is just as sharp and eloquent. He had to be wheeled up to the front of the room and helped out of the chair, but once he was standing at the rostrum in the well of the House he could have been the John Wisdom I first heard speaking to the Credentials Committee at the Republican National Convention in 1952. After his speech, as he was being wheeled down the aisle to tumultuous applause, he cheerily waved his cane to persons on every side. When order had been restored, the Chair of the House, Martha Barnett, remarked that "it is rare to be in the presence of greatness, but for the last 15 minutes this House has been."

Memorandum of Charles Alan Wright to Members of the Council of the American Law Institute, Aug. 9, 1996, at 1.

[68] William J. Brennan, Jr., *"Dispositions That Are Lovely": In Tribute to Judge John Minor Wisdom*, 60 TUL. L. REV. 237 (1985). Justice Brennan concluded his

He commented that Judge Wisdom's judicial service embodied and affirmed the truth of Edmund Burke's words, that "[i]t is . . . our business . . . [t]o bring the dispositions that are lovely in private life into the service and conduct of the commonwealth."[69] Justice Brennan wrote:

> Judge Wisdom certainly embodies an abundance of lovely private virtues: patrician by birth yet zealous in protection of the underprivileged; kind, compassionate, and respectful of all human beings whatever the color of their skin; utterly honest and simple of spirit; uncompromising in his intellectual integrity; possessing a zest for life that continues still – a preeminent scholar in diverse disciplines while a consummate attorney with a passion for the law. These same qualities have transfigured his public acts. "To bring these dispositions that are lovely in private life" into the service of the law — this has been the special hallmark of his entire career.[70]

Judge Henry J. Friendly, who was elected to the Council of the American Law Institute on the same day as Judge Wisdom and served with him on the Special Court, wrote about Judge Wisdom's virtues in similar terms:

> John has truly exemplified Judge Learned Hand's definition of wisdom. He is "wise because his spirit was uncontaminated, because he knew no violence, or hatred, or envy, or jealousy, or ill-will." We admire him for his wisdom but we love him for his courage and good humor, for the quick smile and the warm hand of friendship.[71]

These are just judgments on the character of John Wisdom,

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tribute with these words: "I am proud to call John Minor Wisdom my friend, and I am honored to have this opportunity, quoting Learned Hand, publically, 'to acclaim one, who – himself all unaware of his deserts – has so richly earned our gratitude.'" *Id.* at 239 (quoting Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 172 (1947)).

[69] *Id.* (quoting EDMUND BURKE, THOUGHTS ON THE CAUSE OF THE PRESENT DISCONTENTS 59-60 (1770)).

[70] *Id.* at 237 (citation omitted).

[71] Friendly, *supra* note 4, at 255 (quoting LEARNED HAND, *Mr. Justice Cardozo*, *in* THE SPIRIT OF LIBERTY 132 (1952)).

and it is presumptuous to pretend to add anything to them. It is certainly true that Judge Wisdom's interest in other people was extraordinary, as was the extent of his empathy for their situations. He took great interest in his law clerks and in their lives and careers, but also in those of their families and friends. He never failed to ask how the children were doing at school, and he was not content with polite, superficial answers. He wanted to know about their activities, and especially, of course, about what they were reading. Sometimes he would follow up by sending along something they *should* read. He also was keenly interested in knowing about the activities and successes of friends, and even of friends of friends. He took delight in making new friends and in keeping up with old ones. Many of us are quick to use the extent or importance of our own responsibilities as an excuse for taking little interest in the lives of others. Judge Wisdom was always busy, and his work truly was important, but he was never too busy to be interested in the lives of others. His friends were legion, and their circumstances always were of interest to him. Many of his friends were Supreme Court Justices, Ambassadors, Senators, federal judges, people prominent in business, and leaders of the bar. Others were messengers and typists who worked in the courthouse and trusted him to take their problems as seriously as he would his own. If one spoke to Judge Wisdom about a problem that one of the courthouse staff was having, one would invariably learn that the Judge already knew about it and was working on a solution. On his way home from work, Judge Wisdom always bought his newspaper from the man who sold them from a shopping cart at the corner of Magazine Street and Louisiana Avenue. After the man had been hit by a car, the Judge would frequently inquire about his health and ask whether the lawyer who was handling his case was doing all that he could to get him the recovery he deserved. Judge Wisdom loved mankind, but he liked people too.

If Judge Wisdom had an uncommon gift for friendship, his passion for ideas and his openness to new ideas were equally uncommon. He read widely and well, seemed never to have forgotten anything he learned, and loved nothing so much as testing what he had learned by talking about it with others. Whether the subject was law or history, art or literature, philosophy or anthropology, politics or mythology, archaeology or music, his knowledge was extensive, and his desire to increase that knowledge was unremitting. When asked to give the Commencement Address at Washington and Lee in 1995, he agreed to do so, despite the fact that the event fell on the occasion of his ninetieth birthday. He insisted on one condition, however: that the talk would be a serious one and not the type usually served up on such occasions. The talk was a serious one; the subject was *Plessy v. Ferguson*,[72] and the editors of the Law Review thought the paper worthy of publication, as indeed it was.[73] That evening we were to attend a student production of a Shakespeare play, but the Judge begged off at the last moment, saying that he was tired from the day and wanted to get to bed early. It had been a hot day, and he had worked hard, so we were not surprised that he might be tired. When we came home, however, we found that the Judge had not retired. He had found a copy of *The Red Badge of Courage* in one of the bookshelves and had read through most, but not all of it. What a wonderful book it was, he said. He explained that he had not read it for some time, and he had really forgotten how powerful it is. He was ready to settle in for a long discussion of the finer points of plot and style. It had been a long day for us, if not for him. It was our turn to beg off and go to bed. So *The Red Badge of Courage* went off to New Orleans in the morning, only to be returned a few days later in the company of two books the Judge and Bonnie thought we should read.

Another aspect of Judge Wisdom's character was the sense of intellectual and moral integrity that guided all his endeavors. There is much talk at present about the need for a renewed commitment to the ideal of integrity, not only in the legal profession, but in society generally. For many, however, talk is not matched by action. Judge Wisdom did not talk about the need for integrity; he was neither didactic, except by virtue of his own example, nor expressly judgmental about the actions of others. For him, it was enough to act with integrity. In his case, integrity necessarily was related to courage and perseverance because pursuing what he thought was right often was unpopular, and his opponents sometimes hoped by threats and harassments to exact a heavy price. He made a practice of brushing off questions about the treatment he received, and he always made light of the viciousness of those who bore him ill will. It seems unlikely that he was ever tempted to do less than what he thought was necessary or right, much as that might have advanced his own interests. Such calculations were not only repugnant, but simply foreign to him. It also seems unlikely that he was ever tempted by the balm of righteous bitterness because of the price he had to pay for doing what was right. He was able to act as he did, of course, because of the extraordinary centeredness of his character, a sense of identity and self-knowledge that most of us only hope to achieve. He was able to act as he did because he knew who he was, and he knew the importance of what he had to do. He was "[what] every man in arms should wish to be" — that "generous Spirit" whose "high endeavors are an inward light / That makes the path before him always bright."[74] In all this, however, he never took himself too seriously. Nor did he lose his sense of fun or love of whimsy. His work might have made him feel like the weight of the world was on his shoulders, and he might have been suffering from excruciating physical pain, but he never felt the need to show it. In this connection, I am reminded of Justice Holmes's statement in a letter he wrote to his young friend, Lewis Einstein, in 1917:

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[72] 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

[73] *See* John Minor Wisdom, Plessy v. Ferguson, *supra* note 2.

> I used to dream of a final calm under old trees, possibly, no--impossibly in England or the East. But my life began and seems likely to end in war, and one must grow one's trees in one's soul.[75]

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[74] 1 WILLIAM WORDSWORTH, *Character of the Happy Warrior*, *in* THE POEMS 662, 662 (J. Hayden ed., 1981).

[75] Letter from O. W. Holmes, Jr. to Lewis Einstein (June 27, 1917), *in* THE

If I am correct in my understanding of Justice Holmes's sentiment, I do not think that I have ever known a forester more expert or resourceful than Judge Wisdom.[76]

Perhaps these reflections will give some small insight into the reasons Judge Wisdom was not simply respected or admired, but deeply loved by all who knew him. More succinct, perhaps, is a portion of the citation that was prepared in 1998, when Washington and Lee conferred an honorary degree on Judge Wisdom:

> In 1922, John Wisdom came to this campus as a young man filled with the spirit of inquiry, a deep interest in the business of justice, and a special gift for friendship. Seventy-six years later, that spirit of inquiry, commitment to justice, and special gift for friendship are undiminished and still the driving forces of his life.[77]

Judge Wisdom's birthday often coincided with the Annual Dinner of the American Law Institute, and the president of the Institute would often acknowledge Judge Wisdom's presence and note that he was "surrounded, as always, by his adoring

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HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN 1903-1935 142 (J.B. Peabody ed., 1964).

[76] Nor can one adequately acknowledge the effect that Judge Wisdom has had on generations of young lawyers:

> Judge Wisdom has taught us what it is to be human, and what it means to say that nothing human can be foreign to us. He has taught us to love life, to see the humorous in life (and in ourselves) as well as the serious side of things, to be open to all the possibilities that life brings to us, and, finally, to have faith in ourselves and in what each of us can accomplish in a world that often seems hostile or indifferent to the values that light our way. He has sought to see "life steadily and [see] it whole," and has taught us to do that too. Above all, he has taught us to believe that the profession of the law can be a great and noble one. The debt that we owe to him is one that we can never begin to repay unless it be by aspiring always to meet the standard he has set by his example.

Barry Sullivan, *To See Life Steadily and To See It Whole: For Judge Wisdom in His Ninety-First Year*, 53 WASH. & LEE L. REV. 3, 7 (1996).

[77] Citation presented at the Opening Convocation of the Washington and Lee University School of Law, Aug. 24, 1998 (on file with author).

law clerks." On any given occasion, the set of "adoring clerks" might include several federal judges, members of the Council of the American Law Institute, a former Governor and member of the Cabinet, the heads of independent regulatory agencies, senior partners in leading firms, and distinguished law teachers. The description was apt. Whatever else we might have been, we truly were his "adoring clerks." We were grateful beyond telling for the undeserved friendship of a man who defies every description but one: He was all that a judge should be, and all that a human being can be.[78]

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[78] *See* Presentation of the Edward J. Devitt Distinguished Service to Justice Award to Honorable Elbert Parr Tuttle, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, and Honorable John Minor Wisdom, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana, May 8, 1988, 888 F.2d xciii, civ (1988) (letter of Robert B. Barnett, Esq.).

JOHN MINOR WISDOM AND THE IMPACT OF LAW[*]

Jack Bass[**]

It is a pleasure for me to be here today and a special honor to join Bonnie Wisdom and Dean Sherman.

A few weeks ago, I attended the presentation luncheon for the Southern Regional Council's Lillian Smith Awards. The non-fiction award went to Congressman John Lewis for his memoir, *Walking With the Wind.* He told a childhood story of his aunt scurrying him and fourteen siblings and cousins inside a shotgun house in rural Alabama as a great storm came up. As the winds lifted up a corner of the house, she moved the children there as ballast. As the shifting winds lifted another part of the house, they moved there, walking with the wind. He spoke of that terrifying event—Lightning! Thunder! Hail! Howling wind! It symbolized the storm that would sweep the nation as the civil rights movement.

John Lewis was beaten into unconsciousness as a freedom rider and his skull battered as leader of the first Selma march. He has forgiven those who brutalized him, proclaiming today that we came to America on different ships but now we're all in the same boat. To me, he is the greatest living hero of the civil rights movement

And now, as *Congressman* John Lewis, he symbolizes the great changes that flowed from Judge John Minor Wisdom's central role as one of the unlikely heroes who made the rule of law prevail in taming the storm over civil rights.

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[*] This article is the John Minor Wisdom Lecture which Professor Bass delivered on November 20, 1998, at the Tulane University School of Law. Judge Wisdom attended the lecture.

[**] Professor of Humanities and Social Science, The College of Charleston; Ph.D., Emory University; author of UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT'S *BROWN* DECISION INTO A REVOLUTION FOR EQUALITY (1981).

It is the interaction of that movement and the American Constitution that provides the core for understanding my subject this evening, "John Minor Wisdom and the Impact of Law." The physical courage John Lewis displayed as a civil rights leader was matched by the intellectual and judicial courage Judge Wisdom displayed in developing responses to unresolved legal issues and historic questions about equality, liberty and freedom for which precedent either was inadequate or did not exist.

Lillian Smith herself, in her 1949 book, *Killers of the Dream,* lamented, "had there been a few men in the South with enough strength . . . with enough integrity and energy to act out their own beliefs and with a strong belief in freedom and a clear vision of a new way of life, our people might have been swung around with their faces turned to the future."

Less than a decade later, life seemed to imitate art as a handful of such men emerged as federal judges in the American South. For a decade and a half after the United States Supreme Court decided *Brown v. Board of Education,* a literal handful of Southern judges translated it into a broad mandate for racial justice and equality under law.

Operating in the eye of a storm, they made the Fifth Circuit Court of Appeals the institutional equivalent of the civil rights movement itself. One of them, District Judge Frank M. Johnson, Jr., seemed to speak for them all when he told Boston University law graduates in 1979, "If the life of the law has been experience, then the law should be realistic enough to treat certain issues as special: as racism is special in American history."

Richard Taylor Rives, Elbert P. Tuttle, John R. Brown, and John Minor Wisdom were disparagingly labeled "The Four" by an outraged fellow judge from Mississippi, who saw them as destroyers of the Old South he cherished. But Burke Marshall, who became a law professor at Yale University after serving as Assistant Attorney General for Civil Rights in the Kennedy Administration, viewed them differently: "Those four judges, I think, have made as much of an imprint on American society and American law as any four judges below the Supreme Court have done on any court."

All but Rives were Republicans. Their performance suggests the transformation the Republican Party has since undergone in regard to the legacy of Abraham Lincoln. Judge Wisdom is the last surviving member of The Four.

Like his father—whose framed diploma signed by Robert E. Lee still hangs in the judge's judicial chambers—he attended Washington and Lee, one of the premier liberal arts colleges for young Southern gentlemen. He spent a year as a graduate student studying English at Harvard, where he read voraciously from the stacks in Widener Library and developed a literary flair that would mark his judicial writings.

Judge Wisdom finished first in his class at Tulane Law School, just ahead of Saul Stone. The two would become partners and open a law practice in the firm known today as Stone, Pigman, Walther, Wittmann & Hutchinson.

In World War II, Wisdom served in the Office of Legal Procurement for the Army, rising to the rank of lieutenant colonel. He developed a network of lasting friendships among what Benjamin Kaplan (later a professor of law at Harvard University before becoming a judge on the state supreme court in Massachusetts) called "the best collection of lawyers I've ever seen." He recalled John Wisdom in that environment as a man "loaded with energy and love of life, extremely kindly, with marvelous compassion, enormous brilliance and heart, extremely effective as a lawyer, and a very high sense of relevance."

Early in 1952, in his mid-40s, at his home in New Orleans he and Elbert Tuttle, a fellow lawyer in Atlanta, met at the request of Herbert Brownell, Dwight D. Eisenhower's campaign manager, to organize a campaign in the South to support General Eisenhower for the Republican presidential nomination against Senator Robert Taft of Ohio.

While still a law student at Tulane, John Wisdom had seen the dictatorial control of Huey Long as a threat to democratic principles in his native Louisiana and registered as one of the state's handful of Republicans. He believed Eisenhower, as a World War II hero then president of Columbia University, a stronger candidate and had written him a letter urging him to run for president. Wisdom and Tuttle became co-chairmen of the Southern Conference for Eisenhower and each led pro-Eisenhower delegations that won contested fights for credentials at the Republican national convention. As Attorney General in the Eisenhower Administration, Brownell—a relative of Susan Brownell Anthony who harbored his own quiet passion about civil rights—became a key figure in selecting federal judges.

Judge Wisdom was Republican national committeeman from Louisiana when appointed in 1957 by President Eisenhower to the Court of Appeals for the Fifth Circuit. In those days, the Fifth Circuit covered six Southern states of the old Confederacy: Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.

For a decade and a half, the Fifth Circuit Court of Appeals expanded the scope of *Brown v. Board of Education* in striking down barriers of discrimination. That court, beginning in the late 1950's, became the legal battleground for the civil rights movement. In its *Brown* decision, the Supreme Court at last restored the Thirteenth, Fourteenth and Fifteenth Amendments to their original meaning. But it gave little direction to the lower courts except to apply equitable principles and to proceed with "all deliberate speed."

To Judge Wisdom those were the "bare bones of the Supreme Court's instructions." The lower courts, he later said, had to "flesh it out." They did so in an atmosphere expressed in a speech by Senate Judiciary Committee Chairman James O. Eastland of Mississippi on August 12, 1955, to a cheering audience in his home state. Senator Eastland told them, "On May 17, 1954, the Constitution of the United States was destroyed because the Supreme Court disregarded the law and decided that integration was right. You are not required to obey any court which passes out such a ruling. In fact, you are obligated to defy it."

Judge Wisdom viewed the Thirteenth, Fourteenth, and

Fifteenth Amendments as a response to *Dred Scott*—the United States Supreme Court opinion in 1857 holding that even emancipated Negroes were "being of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had *no rights which the white man was bound to respect.*" Judge Wisdom viewed the three amendments passed after the Civil War as incorporating into the Constitution the concept of the Declaration of Independence that all men are created equal.

As the scholar and driving intellectual force on the old Fifth Circuit Court of Appeals, Judge Wisdom transformed the law of school desegregation, and he developed the constitutional rationale for affirmative action. He wrote trail-blazing opinions involving voting rights, jury selection, and employment discrimination. He helped develop the structural injunction as a new force in the American legal system, used to restructure an ongoing social institution. It was applied to school systems, prisons, and mental health hospitals—and to reapportion state legislatures.

Former law clerks recall that he was quite capable of spending an afternoon playing bridge for high stakes, following it with a few drinks with life-long friends, then discussing and reciting obscure Elizabethan poetry with a law clerk, and after cocktails and dinner at home staying up well past midnight working on one of the many drafts his major opinions went through. Always a voracious reader, he possessed a breath of knowledge one of his law clerks described as "numbing."

A federal judge's oath of office defines its central role as one of administering justice. With his like-minded colleagues on the old Fifth Circuit, Judge Wisdom came to accept a definition of justice as the absence of injustice. This construct provided an important prism for ruling on the central constitutional issues that came before their court.

No opinion drew more fully on Judge Wisdom's intellectual and imaginative force than *United States v. Jefferson*[1] in the mid-1960s, which took almost a year to formulate and which he came to view as the most important of his career.

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[1] 372 F.2d 836 (5th Cir. 1966).

The "important meaning" of *Brown v. Board of Education*, Judge Wisdom wrote,

> is its revitalization of the national constitutional right the Thirteenth, Fourteenth, and Fifteenth Amendments created in favor of Negroes. This is the right of Negroes to *national* citizenship, their right as a class to share the privileges and immunities only white citizens had enjoyed as a class. *Brown* . . . wrote the Declaration of Independence into the Constitution. Freedmen are free men. They are created as equal as are all other American citizens and with the same unalienable rights to life, liberty, and the pursuit of happiness.

In that historical and philosophical context, Judge Wisdom gave *Brown* a meaning that contradicted and overcame the then tenacious holding of Chief Judge John J. Parker of the Fourth Circuit Court of Appeals in Richmond, the "Briggs dictum" that the Constitution "does not require integration. It merely forbids discrimination." Judge Wisdom wrote, "*Briggs* overlooks the fact that Negroes collectively are harmed when the state, by law or custom, operates segregated schools or a school system with uncorrected effects of segregation."

To redress the wrong, Judge Wisdom continued, required "the organized undoing of the effects of past desegregation." In placing an affirmative duty on school boards to develop desegregation plans, the opinion attacked head-on the massive problem of *how* to dismantle the dual school system in the South. It included a model school desegregation order and declared, "*The only school desegregation plan that meets constitutional standards is one that works*."

Although Judge Wisdom collated arguments on specific points from other judges and from scholars, his bold and vigorous language and grasp of the whole issue made *Jefferson* a creative act. At the beginning of the opinion, which covers sixty pages in the *Federal Reporter* series, Judge Wisdom said, "We approach decision-making here with humility."

In assuming leadership for such an awesome undertaking, he grasped fully the risks and difficulties involved, but recognized that unless the courts exerted leadership, there would be none. Years later, he looked back and said, "What caused me to pause in *Jefferson* was the fact that I knew that I would be accused of legislation, and I'm sure I was. However, we had a void. . . . It was a case of having to act."

In the opinion, he realistically assessed the problems faced by school administrators, who

> especially in communities where total segregation has been the way of life from cradle to coffin, may fail to understand all of the legal implications of *Brown*, but they understand the grim realities of the problems that complicate their task.
>
> The Court is aware of the gravity of their problems. (1) Some determined opponents of desegregation would scuttle public education rather than send their children to schools with Negro children. These men flee to the suburbs, reinforcing urban neighborhood school patterns. (2) Private schools, aided by state grants, have mushroomed in some states in this circuit. The flight of white children to these new schools and to established private and parochial schools promotes resegregation. (3) Many white teachers prefer not to teach in integrated public schools. They are tempted to seek employment at white private schools or to retire. (4) Many Negro children, for various reasons, prefer to finish school where they started. . . . (5) The gap between white and Negro scholastic achievements causes all sorts of difficulties. There is no consolation in the fact that the gap depends on the socioeconomic status of Negroes at least as much as it depends on inferior Negro schools.

J. Harvie Wilkinson, currently a judge of the Fourth Circuit Court of Appeals, as a law professor wrote in a 1979 book, *The Supreme Court from Brown to Bakke*, that in *Jefferson* and related cases, Judge Wisdom "transformed the face of school desegregation law." Subsequently, in *Green v. New Kent County*,[2] the Supreme Court adopted Judge Wisdom's reasoning and some of his language in striking down the freedom-of-choice plans that had been ineffective in desegregating public schools in the South.

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[2] 391 U.S. 430 (1968).

Judge Wisdom's opinion in *Jefferson* also helped shape new constitutional doctrine that would lead to affirmative action programs to overcome the effects of past discrimination. "The Constitution is both color blind and color conscious," Judge Wisdom wrote. "To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate government purpose."

In order to expedite the impact of *Jefferson*, the Supreme Court denied certiorari Although Judge Wisdom's opinion provided the clearest and most enduring constitutional rationale for affirmative action, as precedent it seemingly was ignored by the current Fifth Circuit opinion in the *Hopwood* case, which the Supreme Court has declined to review.

In *United States v. Louisiana*,[3] which struck down discrimination in voting rights, Judge Wisdom's landmark opinion reflected his forceful style and masterly ability to create a powerful visual image of a legal abstraction:

> A wall stands in Louisiana between registered voters and unregistered, eligible Negro voters. The wall is the State constitutional requirement that an applicant for registration "understand and give a reasonable interpretation of any section" of the Constitution of Louisiana or of the United States. It is . . . the highest, best-guarded, most effective barrier to Negro voting in Louisiana.

The opinion concluded, "We hold: this wall, built to bar Negroes from access to the franchise, must come down."

This opinion reads like a first-rate doctoral dissertation in its analysis of the history and development of direct and indirect methods to eliminate or reduce black political power in

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[3] 225 F. Supp. 353 (E.D. La. 1963).

Louisiana. Judge Wisdom's creation of a visual image instilled within that opinion the power of an idea whose time had come.

John Doar, then head of the Civil Rights Division in the Justice Department, remembered lawyers there talking in the hallways about voting rights and referring constantly to "that wall that must come down" as they developed drafts of what became the Voting Rights Act of 1965, the landmark legislation that brought down the wall.

Judge Wisdom took pride that he was able to fully research and document his opinion in *United States v. Louisiana* — which was heavily footnoted with references to books, pamphlets, articles, and official reports—from material in his personal library. The bookshelves in his office in what is now the John Minor Wisdom Federal Courthouse contained every reference he used.

One of the most frustrating cases for Judge Wisdom involved the lengthy legal process before James Meredith's admission as the first known African-American student at the University of Mississippi.[4] When District Judge Sidney Mize of Mississippi ruled that Meredith "was not denied admission because of his race," Judge Wisdom responded caustically.

"From the moment the defendants discovered Meredith was a Negro," Judge Wisdom wrote after reviewing the record, "they engaged in a carefully calculated campaign of delay, harassment, and masterly inactivity. It was a defense designed to discourage and to defeat by evasive tactics that would have been a credit to Quintus Fabius Maximus."

After the riot that accompanied Meredith's admission to the University of Mississippi, violence that left two dead and dozens injured, Judge Wisdom's was the strongest voice in what became for him a protracted losing battle to hold Mississippi Governor Ross Barnett in criminal contempt.[5] The final paragraph of his dissenting opinion is a literary classic in legal opinion writing. He penned the last sentence in iambic pentameter:

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[4] *See* Meredith v. Fair, 305 F.2d 341 (5th Cir. 1962); 306 F.2d 374 (5th Cir. 1962).

[5] *See* United States v. Barnett, 346 F.2d 99 (5th Cir. 1965) (Wisdom, J., dissenting).

> There is an unedifying moral to be drawn from this case of *The Man in High Office Who Defied the Nation*: The mills of the law grind slowly—but not inexorably. If they grind slowly enough, they may even come, unaccountably, to a gradual stop, short of the trial and judgment an ordinary citizen expects when accused of criminal contempt. There is just one compensating thought: Hubris is grist for other mills, which grind exceeding small and sure.

In dealing with jury discrimination in Louisiana, Judge Wisdom wrote a major treatise in *Labat v. Bennett*.[6] He found discrimination in an Orleans Parish jury selection system that excused daily or hourly wage earners from serving, officially for the beneficial purpose of sparing them financial hardship. "As it was bound to," Judge Wisdom wrote, their disqualification "operated to exclude all but a token number of Negroes" from the jury lists. He observed with bite, "The system was neutral, principled, and—foolproof: No black ever sat on a grand jury or a trial jury panel in Orleans Parish."

Judge Wisdom wrote several landmark opinions in employment discrimination cases. In *United Papermakers*,[7] he established basic law in an employment discrimination case that set standards for determining seniority rights for black workers who previously had been discriminated against. A decade later, in 1979,[8] the Supreme Court adopted the basic reasoning of his dissent in *Weber v. Kaiser Aluminum & Chemical Corp.*[9] to uphold a hiring plan designed to overcome the effects of past discrimination.

Judge Wisdom's name came up as a possible Supreme Court nominee in 1969 after the Senate rejected President Richard Nixon's nomination of Chief Judge Clement F.

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[6] 365 F.2d 698 (5th Cir. 1966).

[7] United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).

[8] *See* United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

[9] 563 F.2d 216 (5th Cir. 1977).

Haynsworth of the Fourth Circuit Court of Appeals. The *Baltimore Sun* reported that a moderate Republican governor suggested to Attorney General John Mitchell the name of Judge Wisdom. "He's a damn left winger," the governor reported Mitchell had snorted in reply. "He'd be as bad as Earl Warren."

Judge Wisdom took a journalist friend's advice to ignore Mr. Mitchell's remarks. But Chief Judge Tuttle, after taking a week to get over his anger, responded with a letter. He wrote to Mitchell,

> Mr. Attorney General, I simply wish to say to you that there is no possible basis for speaking of Judge Wisdom as a "left-winger," whether "damned" or not, except that he faithfully followed the United States Constitution and the statutes enacted by Congress with respect to the granting of equal rights to Negro citizens in his state and the other states of our circuit. For having done so, he has suffered as you might well expect what a fifth or sixth generation southerner would suffer under the circumstances. This, I am sure, he expected and was prepared to accept. For him, in addition, to be branded by the Attorney General of the United States, speaking as a representative of the President, whose duty it is to nominate judges to the highest court, as a "damned left-winger," seems to me to be a little too much.
>
> Knowing that every criticism made by you against Judge Wisdom applies equally against several of the others of us on this court, I felt that I could not honorably remain silent without expressing my feelings to you.

With Tuttle, Brown, Rives, and such district court judges as Frank Johnson and Skelly Wright, Judge Wisdom shared a quiet passion that reacted to injustice. In translating the Supreme Court's basic school desegregation decision into a broad mandate for racial justice and equality under law, they battled to make the rule of law prevail during a period of social upheaval. They not only accepted the Constitutional philosophy that extended downwards from the Warren Court, but reinforced it upward and outward, stretching and expanding the law to protect rights and liberties granted by the Constitution. They proved that change can come from below, provided there is an accepting climate in the structure above. By pressing forward, the Fifth Circuit allowed the Supreme Court to escape much of the heat, but the Justices also believed that desegregation law shaped by *southern* judges would be more acceptable to the South.

For more than a decade beginning in 1957, Judges Tuttle, Brown, Rives and Wisdom dominated the Fifth Circuit Court of Appeals. Their response to cases involving unresolved issues of fundamental rights granted by the Civil War amendments to the Constitution made their court an active and vital force in transforming the South and reshaping the nation. Experience shaped them into judicial activists who learned that precedent may be inadequate when applying law to solve new problems.

The interaction between essentially Republican judges and an activist Democratic Justice Department was viewed by Burke Marshall as critical because it allowed civil rights cases in the South to be decided in a politically nonpartisan setting. In addition, the interaction between Fifth Circuit judges and the Kennedy and Johnson Justice Departments shaped and validated the Civil Rights Act of 1964 and the Voting Rights Act of 1965, landmark legislation that hastened the South's full reunion with the rest of the country.

Leaders of the civil rights movement learned that ultimately the federal courts would react against unjust laws in the most recalcitrant states. "If you hadn't had those judges on the Fifth Circuit . . . you would have had much more in the way of demonstrations, violence, repression, revolution — that may be too strong a word, but it was moving in that direction," said Nicholas Katzenbach, Deputy Attorney General under Robert Kennedy, and his successor under President Lyndon Johnson. "Bobby Kennedy and others [in the Justice Department] . . . persuaded civil rights leaders to use the judicial process, that it could get them where they wanted to get. I think without the Fifth Circuit we would never have been able to succeed in doing that."

The Fifth Circuit also meant something else. Carsie Hall, an African-American native of rural Mississippi who had studied law through a correspondence course while a postal worker in Jackson, managed to pass the state bar examination in the early 1950s. He and one or two others like him became invaluable to the NAACP Legal Defense Fund because they were available to sign legal papers filed in Mississippi courts and assist better-trained northern lawyers after the legal battles began. In semi-retirement, Carsie Hall thought for a moment before responding to a questioner: "I really don't know that much about the Fifth Circuit Court of Appeals," he said. "About all I can say is that they gave us hope."

President Jimmy Carter recognized the role of the old Fifth Circuit Court of Appeals when he signed the Circuit Court of Appeals Reorganization Act, which left Louisiana, Mississippi and Texas in the new Fifth Circuit and placed Alabama, Florida and Georgia in a new Eleventh Circuit. "As our Nation declared its intent to end all forms of discrimination based on race and color," President Carter said, "the Fifth Circuit bore the heavy burden of applying the principles laid down by the Supreme Court in a long series of landmark cases . . . holding us to the highest principles of justice on which our nation was founded. . . . "

Within this context, Judge Wisdom played a special role. President Bill Clinton, in awarding Judge Wisdom the Presidential Medal of Freedom in 1993, said that his opinions "advanced civil rights and economic justice, and his inspired words echo throughout many of this century's most significant Supreme Court opinions."

Yale University Law Professor Owen Fiss, a leading scholar of the Fifth Circuit's role, wrote, "It was not reasonable to expect judges to be heroes, but the truth of the matter is that many lived up to these unreasonable expectations — they fought the popular pressures at great personal sacrifice and discomfort."

They were men whose leadership swung the people of the American South around with their faces turned to the future. Among them Judge Wisdom stands tall in his leaving a mark on the impact of law—walking with the wind to enlarge our home of liberty under the Constitution.

JOHN MINOR WISDOM: A BRIEF OVERVIEW OF HIS EPOCH

Charles Clark[*]

I. THE COURT

John Minor Wisdom of New Orleans, Louisiana, was appointed a Circuit Judge of the United States Court of Appeals for the Fifth Circuit on June 27, 1957. He was then age fifty two. He took the oath of a judge to "administer justice without respect to persons and do equal right to the poor and the rich" on July 13, 1957. He succeeded another Louisiana Episcopalian, Wayne G. Borah. His six other colleagues in active service were Chief Judge Joseph C. Hutcheson and Judges Richard T. Rives; Elbert P. Tuttle, Ben F. Cameron; Warren L. Jones and John R. Brown. All of his fellows, except Judge Brown, were at least ten years older. Judge Hutcheson was seventy seven.

In 1962, the Court increased in size to nine active judges with the addition of Judges Walter P. Gewin and Griffin B. Bell. In 1969, the Court increased again, this time to fifteen judges. Eventually, the six-state Circuit had a total of twenty-six active judges. Judge Wisdom adamantly opposed any division of the Court. However, when the number against division dwindled to Judge Wisdom alone, Congress decided to split the Fifth Circuit into two courts by creating the Eleventh Circuit, comprising of Alabama, Georgia and Florida.

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[*] Former Chief Judge of the United States Court of Appeals for the Fifth Circuit. Judge Clark is currently a partner in the law firm of Watkins & Eager in Jackson, Mississippi.

II. THE LAWYER

John Minor Wisdom was born in New Orleans, Louisiana, and spent his life there except for his undergraduate days at Washington & Lee University and his World War II service in the United States Air Force for which he was awarded the Legion of Merit. He attended law school at Tulane University where he graduated at the head of his class. He formed a partnership with fellow student, Saul Stone. That firm endures today as Stone, Pigman, Walther, Wittmann & Hutchison. His wife, Bonnie, survives him, along with their two daughters. In one of his many significant cases as a litigator, he represented Schewgmann Bros., a large New Orleans supermarket. The action was an antitrust suit challenging price-fixing by liquor distributors for products sold to Schewgmann. Although he lost a split decision on the appeal to the Fifth Circuit, he succeeded in reversing the Fifth Circuit's holding in the Supreme Court of the United States.

Lawyer Wisdom was a determined, but lonely, Republican in the then heavily Democrat State of Louisiana. At the 1952 Republican National Convention, he gained recognition from the Credentials Committee for the Louisiana delegation he supported. This was the convention which nominated Dwight D. Eisenhower. This success and the delivery of the Louisiana and Georgia delegations to General Eisenhower helped both John Wisdom and Elbert Tuttle of Georgia gain their appointments to the Court of Appeals when the general became President.

III. THE JUDGE

Judge Wisdom brought the same prodigious work ethic and a keen analytical mind to the bench. He also brought a stroke of genius in his pen. It would not be appropriate in this overview to attempt to catalogue even the best of the important opinions he wrote for the Fifth Circuit. It would leave out too many or over-stay the reader's welcome. It is sufficient to say that his all-star status as the best craftsman of its judicial policy is firmly fixed in the annals of the Court. Indeed, the Court benefitted so greatly from the scholarly, well-written opinions of this one judge that one must say the Fifth Circuit would not be today the leading court in the land without his service.

I had the privilege of participating in the briefing and arguing of appeals for the State of Mississippi and its officials in the tense, emotionally charged period of the early 1960s. While my clients seldom prevailed on the issues raised, we never left the courtroom when Judge Wisdom was on the bench without the assurance that our position had been thoroughly considered and that we had been treated fairly and courteously. Had Judge Wisdom been a less able and persuasive jurist, the State could not have achieved its purpose of validating the authority of the legal principles which imposed such sweeping social changes on the citizens of Mississippi. When a preponderant majority of citizens do not want to follow the rule of law, anarchy results and force must restore order. Much of the willingness of the citizenry throughout the deep south to yield peaceably to the new day must be attributed to John Minor Wisdom's reasoned intellect and persuasive writings.

In two other ways, my life was influenced by Judge Wisdom. In 1969, I was nominated to be a judge of the Fifth Circuit. My representations of Ole Miss in the James Meredith case, of Governor Ross R. Barnett in the follow-on criminal contempt action, and of various state officials in voting and public school cases all were raised against my nomination. Judge Wisdom and the other judges of the circuit before whom lawyer Clark had appeared were willing to stand up and say that the work I had done as a legal professional was no strike against my service as a judge on the court. Their willingness to trust me to be true to a judge's oath has always been a matter of great pride to me.

After I joined the court, I could not have asked for a finer, more cordial colleague than John Wisdom. He aided my transition from bar to bench in every way he could. He never was too busy for a word of sound advice. When I asked for it, it always was given and with a smile and often with a good New Orleans story or two. I am grateful for his broad-minded support and gracious help.

Judge Wisdom's legal career spanned much more than his very full forty-two years of Fifth Circuit service. He was an outstanding lawyer before he became a judge. His work with the American Law Institute brought him national acclaim. So did his service as Chief Judge of the Railroad Court. After taking senior status, he continued to serve actively on the Fifth Circuit and by invitation on many other courts of appeal throughout the nation. Indeed, he remained as active as any judge of the court in regular active service until the time of his death.

IV. CONCLUSION

All of the appropriate superlatives due a life truly well-lived are justly heaped on John Minor Wisdom. He was a man for all times and unusually ahead of them. He lived and worked with a twinkle in his eye. The nation and its system of law which he loved and supported will sorely miss this monumental lawyer and jurist.

JOHN MINOR WISDOM: A TRIBUTE AND MEMOIR BY ONE OF HIS LAW CLERKS

Allen D. Black[*]

Thirty-three years ago, when I was fresh out of the University of Pennsylvania Law School and still wet behind the ears, I headed south to clerk for a judge on the Fifth Circuit by the name of John Minor Wisdom. It was 1966 and an exciting time to clerk in the Fifth Circuit. The Court was in the thick of the civil rights revolution and was grappling with thorny issues involving voting rights, school desegregation, and public accommodations.

I did not realize it as I drove through the Deep South on my way to New Orleans that August, but I was about to embark on an experience that would not only shape my professional career, but also in large part define who I am as a human being. The reason was the powerful intellect, the powerful personality, and the powerful humanity of John Minor Wisdom.

When Judge Wisdom died earlier this year, just two days before his 94th birthday, it was a time of great sadness, but also a time to be grateful and joyful, thinking back on his long and distinguished life, full of lofty achievement, heroic public service, and great happiness. Intellectually, we all knew that day was inevitable, but our hearts had fooled us into thinking it would never come.

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[*] Founding member, Fine, Kaplan and Black RPC, Philadelphia, PA. B.A. 1963, Princeton University; LL.B. 1966, University of Pennsylvania; Judge Advocate General's Corps of the United States Navy from 1968-70. Mr. Black taught at the University of North Dakota Law School from 1970-71 and has served as an adjunct professor of law at the University of Pennsylvania, Temple, and Rutgers (Camden) Law Schools. Mr. Black clerked for Judge Wisdom from 1966-67.

The other articles in this symposium deal with Judge Wisdom's enormous contributions to the law, in civil rights particularly, but in many other fields as well.[1] I would like to share some more personal memories and thoughts about the Judge[2] as I knew him as his law clerk and for thirty some years thereafter as my mentor and close friend.

By the time I arrived at 400 Royal Street, Judge Wisdom was already a giant of the law.[3] But he did not see himself as towering over his law clerks. Rather, he treated his law clerks as respected colleagues, friends, and (almost literally) as members of his family. His wife, Bonnie, and his children John, Kit, and Penny, graciously accepted the law clerks as sons and daughters, brothers, and sisters. It was an extraordinary experience. Over the years, there were ninety-five law clerks who became part of the Wisdom family.

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[1] The Judge was well known for his scholarship in many areas of the law. For many years he taught trusts and estates (more properly, successions) at Tulane Law School. *See, e.g.,* John Minor Wisdom, *A Trust Code in the Civil Law, Based on the Restatement and Uniform Acts: The Louisiana Trust Estates Act,* 13 TUL. L. REV. 70 (1938). He was an expert in Louisiana civil law, an expertise in which he took great pride, both because of its local significance and because it gave him a chance to show off his skills in the French language. Dean Barry Sullivan wrote:

> Judge Wisdom's judicial work stands as a sturdy testimonial to the continued importance of liberal learning in adjudication and to the view of adjudication as an exercise in intellectual and moral excellence. During the past twenty-nine years, Judge Wisdom has written well over a thousand opinions. He has written, not only with clarity, elegance, and style, but also with moral courage and intellectual authority, in virtually every area of law known to the federal courts. Throughout his years on the bench, and, indeed, one supposes, throughout his professional life, Judge Wisdom has combined the highest standards of technical expertise with that panoramic view which is both the hallmark of liberal learning and the source of moral courage in adjudication.

Barry Sullivan, *The Honest Muse: Judge Wisdom and the Uses of History,* 60 TUL. L. REV. 314, 321-22 (1985) (footnote omitted).

[2] All of us called Judge Wisdom simply, "The Judge." Even those clerks who have become judges themselves continue to call him simply, "The Judge."

[3] By 1966, the Judge had already written landmark civil rights opinions in the areas of education (Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962)), federal supremacy (United States v. Barnett, 346 F.2d 99, 104-09 (5th Cir. 1965) (Wisdom, J., dissenting)), voting rights (United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963), *aff'd,* 380 U.S. 145 (1965)), and jury discrimination (Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966) (en banc), *cert. denied,* 386 U.S. 991 (1967)).

The Judge was appointed to the Fifth Circuit in 1957 by President Eisenhower. It is interesting to me that many of the judges who did the most for civil rights in that era were Republicans, and were appointed by Republican presidents.

I observed three things about the Judge soon after I started work: 1) The Judge was a careful writer, who insisted on precision in his own writing, and taught precision to his clerks, 2) the Judge loved language and words and insisted that each word be just right, 3) the Judge was indefatigable in his legal research and expected his law clerks' research to be thorough as well.

Upon each law clerk's arrival, the Judge would refer him or her to Strunk & White's *Elements of Style* and Theodore Bernstein's *The Careful Writer* and point out some of his personal stylistic pet peeves: splitting an infinitive or a perfect-tense verb, putting a comma or period inside the quotation marks when it should be outside, or the use of what the Judge called, contemptuously, "elegant variation."[4] In later years, the Judge compiled a written list of style tips that he gave his clerks at the beginning of each year.[5]

I have fond memories of spirited debates in chambers about whether it should be "which" or "that", whether an antecedent was clear, or whether this was one of the rare occasions when it would be acceptable to use a "weasel word" such as "very" or "quite". Those debates were almost as much fun as the debates over legal issues.

The Judge's eye for precision in writing stayed with him right up to the end.[6] At the time of the Judge's funeral this past May, Andrew Kelly, one of his current law clerks, gave me a copy of the instructions the hospital had issued to the Judge before his last coronary operation. "You may only take Tylenol for minor muscle aches or headache," the paper said. Ever the editor, the Judge had circled "only" and moved it so the sentence read, correctly and with greater clarity: "You may take Tylenol *only* for minor muscle aches or headache."[7]

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[4] Using a different word with a slightly different meaning to avoid repetition, but at the expense of precision. "If you want to say exactly the same thing," the Judge would say, "don't be afraid to use exactly the same word."

[5] It is a six-page memorandum entitled, *Wisdom's Idiosyncrasies*, and is dated May 31, 1990.

[6] The Judge's commitment to eradicating racial discrimination also persisted right up to the end. In June 1998 at age 93, less than a year before his death, the Judge wrote an impassioned dissent from a panel decision upholding a Lou-

The Judge was just as precise and careful with words as he was with grammar and punctuation. Only the right word would do. Many a dinner-table conversation at the Wisdom home included debate about the precise meaning of some word or other. After much fierce discussion, the Judge would march off to his library to consult Webster's *Second International Dictionary* and confirm that, once again, he was right.[8] The Judge was extremely annoyed with the publication of Webster's Third, a work he considered so inferior to its predecessor as to be nearly heretical or seditious.[9]

The Judge's scholarship in the law was renowned. His research was always thorough. Frequently, he would insist on consulting source materials, even if they were hard to find or

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isiana school district's attempt to split the district in two, thus creating an all-white system and an all-black system. "The . . . majority opinion is . . . a blatant attempt to establish a special public school district for whites in a limited area known as the white section of Alexandria," the Judge wrote. "It is incredible that half a century after *Brown*, one should have to ask for an en banc judgment to prevent the establishment of a school for whites in a public school system." Valley v. Rapides Parish Sch. Bd., 145 F.3d 329, 334 (5th Cir. 1998), *vacated en banc*, 173 F.3d 944 (5th Cir. 1999).

[7] As stated in *Wisdom's Idiosyncrasies*: "*Only* belongs immediately before the word it modifies. That way you avoid such inanities as 'He only killed her.'" *Wisdom's Idiosyncrasies, supra* note 5, at 2.

[8] Given the Judge's love of language, it is no surprise that he was an avid collector of books. Starting as a child, the Judge collected books throughout his life. In 1998 he gave his important collection of law books to Tulane Law School, which dedicated a special room to the collection. The collection is particularly strong in the civil rights area and in rare old volumes of the Civil Law. The Wisdom Room at Tulane also includes the Judge's judicial papers, which he gave to Tulane in the early 1980s.

[9] In *Wisdom's Idiosyncrasies*, the Judge advised his law clerks: "Generally speaking, use any dictionary except Webster's Third." *Wisdom's Idiosyncrasies, supra* note 5, at 5.

written in a foreign language. One example I remember well was the *Air France* case,[10] which arose from the tragic crash of a charter air liner carrying members of the Atlanta Art Association on a pilgrimage to Paris. All aboard were killed.

The case was troublesome because the Warsaw Convention, if it applied, would limit the airline's liability to approximately $8,000 per passenger. The question was whether the Convention applied to that particular charter flight.

After various law clerks had struggled with the case for two years, the Judge took the research into his own hands. He consulted not only the original text of the Convention (in French), but also the Convention's legislative history (also in French), the Code Civile of France, and numerous scholarly works on the Convention and on international air law in general.

His opinion is a *tour de force* of legal scholarship, in which he weaves together underlying concepts from the common law and civilian systems, compares French and English texts of the Convention, discusses the pertinent scholarly writings, and, finally, analyzes the few prior decisions that are helpful by analogy. Two brief quotations illustrate the virtuosity of his performance:

1) Discussing the legislative history of the Convention:

> We look now to the role contract plays in achieving the objectives of the Conference. We note, in passing, that the underlying concepts are civilian in origin and that much of the difference in views among the jurists on [the drafting committee] and the delegates to Warsaw is attributable to the conceptual differences in the laws of France, Italy, Germany, and the Scandinavian countries, to say nothing of the difference between the civil law and the common law.[11]

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[10] Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

[11] *Block*, 386 F.2d at 331 (footnote omitted).

and

2) Comparing the French and English versions of the Convention:

> In its English translation, Article 1(2) reads as follows: [Quoting it, with a footnote quoting the French.] This is a poor translation of the original and official French version, which also states that both parties need agree to the stopping places but which does not assert or imply that this agreement need be made as part of a single and direct contract. Instead of the language, "according to the contract made by the parties", the French version reads "d'apres les stipulations des parties". Thus the French version refers to the *stipulations* (conditions) agreed to by the parties rather than to "*the contract* made by the parties". The French version therefore would include the situation where both main parties agree to the same route but do so through a third party such as the Atlanta Art Association.[12]

The Judge wrote one of his most important opinions, *United States v. Jefferson County Board of Education*,[13] during the year of my clerkship. In most cases the Judge would ask his clerks to research and prepare an initial draft of the opinion, but in *Jefferson*, as in most of his important civil rights cases, the Judge did the research and wrote the first draft himself.[14] As other writers have properly pointed out, *Jefferson* was a masterpiece of creative legal craftsmanship.[15] In it, the Judge devised a means for the southern federal courts efficiently and effectively to carry out their Constitutional mandate to eliminate racial discrimination from hundreds if not thousands of school districts in six states. That task was difficult enough at the level of Constitutional and legal theory. But at the practical level, it was truly daunting. The Judge realized that the District Courts needed help, and in *Jefferson* he gave it to them. The prodigious amount of research and work that went into *Jefferson* is apparent from the face of the opinion.

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[12] *Id.* at 332-33 (emphasis in original). There are other places in *Block* in which the Judge writes in both French and English, switching effortlessly from one to the other. *Id.* at 328 n.99, 329 n.16.

Note also the punctuation outside the quotation marks, as per *Wisdom's Idiosyncrasies*, *supra* note 5, at 3.

[13] 372 F.2d 836 (5th Cir. 1966).

[14] The one exception my year was *Palmer v. Thompson*, 419 F.2d 1222, 1229 (5th Cir. 1969) (Wisdom, J., dissenting), *aff'd*, 403 U.S. 217 (1971), for which the Judge allowed me to do the research and write the initial draft of what became, two years later, his en banc dissent. I was thrilled, honored, and somewhat daunted (all at the same time) to have been given that privilege and responsibility.

[15] *See, e.g.*, JACK BASS, UNLIKELY HEROES 297-98 and 308 (1981) (particularly

The law was only one of many facets of this marvelous and gentle man. For example, there was politics. As we think back on his rich and full life, we must not forget that as a political leader, John Wisdom was the father of the two-party system in Louisiana. Disgusted with the demagoguery of Huey Long, the young John Wisdom registered as a Republican at age twenty one. He was convinced that a strong two-party system was essential to guard against corruption and oppression. With characteristic savvy and determination, he worked precinct by precinct to wrest control of the party from the dead hand of the past. He argued brilliantly to seat his Eisenhower delegation at the 1952 national convention, using national television as a political tool for the first time. By 1956, he carried Louisiana for Eisenhower. His efforts have surely borne fruit, for today neither party can take a general election for granted in Louisiana.

Of course, the Judge had to give up politics after he went on the bench. But that didn't mean he lost his interest or stopped paying attention. He was always hungry for news of politics, especially if it involved Lamar Alexander,[16] Bill Pryor,[17] or Ricki Tigert Helfer.[18] He watched Rita Braver reli-

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pages 297-310); Jack Bass, *The Fifth Circuit in Southern History*, 19 GA. L. REV. 473, 479 (1985); Jack Greenberg, *Foreward: A Civil Rights Symposium Honoring Judge John Minor Wisdom*, 74 TUL. L. REV. 1351, 1352-53 (1990).

[16] Lamar Alexander clerked for the Judge in 1965-66 and went on to become a two-term Governor of Tennessee and later United States Secretary of Education and candidate for the Republican Presidential nomination.

[17] Bill Pryor clerked for the Judge in 1987-88 and is currently Attorney General of Alabama.

[18] Ricki Tigert Helfer clerked for the Judge in 1976-77 and served as Chair-

giously, even when she was covering a *Democrat* White House.[19] He was a bit like a little boy who was allowed to look at the cookie jar or smell the cookies baking in the kitchen, but wasn't allowed to eat. One of my favorite memories is the T-shirt Bob Barnett gave the Judge at one of the law clerk reunions. "WISDOM IN '88," it said in big bold letters. The Judge put it on immediately and proudly touted his fantasy ticket all over Antoine's.

For nearly sixty years, the Judge was active in the American Law Institute. He was a member of the Council for nearly forty years. He enjoyed both the intellectual work of the Institute and the opportunity it gave him to be with good friends from all over the United States.

He loved and respected the ALI, and the Institute returned that love and respect to him. At a banquet a few years ago, the President of the Institute announced that it was Judge Wisdom's birthday that evening, whereupon the entire body rose and sang "Happy Birthday" to the Judge. He waved his cane in the air and just loved it. I have been attending ALI banquets for nearly twenty-five years, and I have never seen that honor, that degree of affection, accorded to anyone else.

Judge Wisdom's life was not all work. He had a happy personal life as well. He loved his wife Bonnie, his children, his law clerks, his colleagues on the Fifth Circuit, and his many friends from New Orleans and around the world. And they loved him. And he knew it. He knew how to have fun, and he put that knowledge to good use.[20] He had a wonderful spirit:

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man of the Federal Deposit Insurance Corporation from 1994 to 1997.

[19] Rita Braver was for years the White House correspondent for CBS News. She is the wife of Bob Barnett, who clerked for the Judge in 1971-72. Bob and Rita were married by the Judge during the year of Bob's clerkship in the living room of the Wisdoms' beautiful antebellum home at 1239 First Street in New Orleans. Bob is now a partner in the Williams & Connolly firm of Washington, D.C. For years he has been active at the highest levels of the national Democratic Party and has played the role of the Republican nominee in helping Democratic presidential candidates prepare for national debates. The Judge and he never let their political differences get in the way of their strong friendship.

[20] The Judge loved to go to the Louisiana Club to play bridge at least one afternoon a week. "I'll get home on my own," he would tell the law clerks with a

An unquenchable *joie de vivre* that permeated all he did. Thankfully, he had his health, his mental faculties, and that most wonderful sparkle in his eye right up to the last.

The Judge taught his law clerks not only how to think and how to write, but also how important it is to enjoy life to the fullest. By word and example, he showed us how to have a good time. Brandon Bradkin[21] tells of the time he and a group of visiting judges' clerks were planning to go to dinner at a New Orleans restaurant renowned for both excellent food and reputed ties to the mafia. One of the other clerks had to bow out because her judge was worried about the mafia rumors. When Brandon inquired of Judge Wisdom what he should do, the Judge responded: "Brandon, the question isn't whether you should go; the question is what you should order."

For most of the law clerks, our initiation into the Wisdom family began with such a dinner invitation a few days or a week into the clerkship.[22] There would be drinks in the library, with lively conversation about law, literature, opera, or current happenings of the times, and then an elegant dinner in the Wisdoms' formal dining room. Few of us had ever had such an experience, and it showed. Lamar Alexander tells of being completely befuddled over what to do with an artichoke. Marty Feldman removed his finger bowl and put his ice cream directly on the doily underneath.[23] I blew it in using the fish knife, an implement I had never seen before in my life.

But the Judge and Bonnie understood. They gently corrected and educated us in manners and in social graces, and it became clear that they really cared. We all had fun, so much

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twinkle in his eye. It was obvious he was anticipating a lot of fun.

[21] Brandon Bradkin clerked for the Judge in 1992-93. He is now an investment banker with Chase Investment Bank, Ltd. in London.

[22] Gene Marans and Lamar Alexander had a less genteel introduction to the Wisdom home on First Street. They arrived in New Orleans the same night as Hurricane Betsy in August 1965 and spent their first night helping the Wisdoms board up the house and ride out the storm. Gene is now a partner in the Washington office of Cleary, Gottlieb, Steen & Hamilton.

[23] Marty Feldman was the Judge's first law clerk, from 1957 to 1959. He is now a United States District Judge for the Eastern District of Louisiana in New Orleans.

fun at those dinner parties, and in everything else we did with the Judge and Bonnie.

It would not be right, or even possible, to talk of John Minor Wisdom's life without mentioning his beloved Bonnie. They married in 1931, just two years after he graduated from law school. They adored each other and had an active and stimulating life together for nearly sixty-eight years. Bonnie provided a dazzling intellectual foil to the Judge throughout his life, was his partner in organizing the Republican party in Louisiana, and singlehandedly saved the French Quarter from an elevated riverfront expressway. She is also a recognized expert on Shakespeare and Marlowe.

The Judge loved to talk about Bonnie's intellectual prowess and was particularly proud when Yale Professor Owen Fiss cited one of Bonnie's papers on Albion Tourgee in his book on the history of the Supreme Court.[24] The Judge sent a copy of the citation to all his law clerks inscribed, "Warm regards from JMW & the noted legal historian BMW."

Every year on their anniversary, the Judge would give the same toast to Bonnie: "Here's to __ years of wedded bliss, and not a peaceful moment." And every year Bonnie would respond, "But peace is boring." Many of the law clerks, I know, have borrowed that toast and use it with joy and affection in their own lives. It captures well, I think, the lively spirit of that extraordinary couple and that extraordinary marriage.

The Judge delighted in each of his three children. John, the eldest, earned a Ph.D. in art history from Harvard and went on to become a respected curator of drawings and etchings at the Ackland Museum in North Carolina and later the Houston Museum of Fine Arts. By the time of his death in 1985, John had assembled an important collection of pre-Raphaelite drawings. It now hangs as the John Minor Wisdom collection at Notre Dame University.

Kit's life-long interests have been horses and politics. She was an assistant in community affairs to Mayor John Lindsay of New York and taught handicapped children to ride horses in Central Park. She has studied veterinary anatomy and over the past decade has been living in Vermont and working in muscle therapy for animals.

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[24] Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910*, *in* 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 354 n.10 (1993).

Penny, like her father, is a lawyer with a real flair for writing. She practiced law in California and Montana before moving to Poplarville, Mississippi last year. She is an accomplished, published novelist and has become quite an expert in raising sheep and training border collies.

And then there are the other ninety-five children. Many judges like to say they are close to their law clerks, but I am confident there has never been anything like this. We really *are* members of the family. And the relationship has lasted all our lives. There is no such thing as a former Wisdom clerk.

The Judge and Bonnie cared for the law clerks in so many ways. They were wonderful sounding boards for young people just starting out in life. They listened to our personal and professional problems and gave us good advice. They followed our careers, our love lives, our marriages, and our children with the real and tender interest only a parent can display.

The Judge married many of us and swore some of us into high office. The Judge and Bonnie attended our children's piano recitals and brought presents to them whenever they came to visit. Hank Greely and Laura Butcher named their son, John Wisdom Greely.[25]

The Judge opened so many doors for us. I know for a fact I would not be where I am today had it not been for the Judge. And I am sure the same is true for all of the law clerks.

He was *so* proud of us and of our accomplishments. He was tickled pink each time one of us became a partner in his or her law firm, was elected or appointed to high office, or chalked up some other significant accomplishment. It warms my heart to think how pleased he was with us.

And we have given him good reason to be proud. We count among our number five federal judges,[26] the Governor of Tennessee,[27] the Attorney General of Alabama,[28] the United States Secretary of Education,[29] the Chairman of the Federal Deposit Insurance Corporation,[30] ten law school professors (including the deans of Texas and Washington & Lee),[31] two members of the ALI Council,[32] and numerous highly successful private lawyers and businessmen.

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[25] Hank Greely clerked for the Judge in 1977-78 and is now Professor of Law at Stanford University.

[26] Marty Feldman is United States District Judge for the Eastern District of

Judge Wisdom received many high honors and accolades during his lifetime: The Presidential Medal of Freedom, the ABA Medal, the Devitt Award, the naming of the Fifth Circuit's Court House in his honor, and eight honorary degrees including awards from Harvard, Tulane, and—less than a year before he died—his beloved Washington & Lee.

The Judge adored the tributes and praise that were heaped upon him. He was not the least bit bashful about it, nor should he have been, for they were all well deserved.[33] I am so grate-

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Louisiana. Brock Hornby is Chief Judge of the United States District Court for the District of Maine. Nora Manella is United States District Judge for the Central District of California. Jerry Brown is United States Bankruptcy Judge for the Eastern District of Louisiana. Victor Pohorelsky is United States Magistrate Judge for the Eastern District of New York.

[27] Lamar Alexander served as Governor of Tennessee from 1979 to 1987.

[28] Bill Pryor was elected Attorney General of Alabama in 1998, having first been appointed to that office by the Governor in 1997.

[29] Lamar Alexander served as Secretary of Education from 1991 to 1993.

[30] Ricki Tigert Helfer served as Chairman of the Federal Deposit Insurance Corporation from 1994 to 1997.

[31] Gail Agrawal clerked in 1983-84, and teaches at the University of North Carolina Law School. Mitch Crusto clerked in 1981-82 and teaches at Loyola School of Law in New Orleans. Phil Frickey clerked in 1978-79 and teaches at the University of Minnesota Law School. Hank Greely clerked in 1977-78 and teaches at Stanford Law School. Stan Langbein clerked in 1973-74 and teaches at the University of Miami Law School. Glynn Lunney clerked in 1990-91 and teaches at Tulane. Madeline Morris clerked in 1989-90 and teaches at Duke Law School. Ernie Smith clerked in 1962-63 and teaches at the University of Texas Law School. He served as dean there from 1974 to 1979. Suzanne Stone clerked in 1978-79 and teaches at the Cardozo School of Law in New York City. Barry Sullivan clerked in 1974-75 and is the Dean of the Washington & Lee Law School.

[32] Allen Black and Brock Hornby.

[33] While he plainly enjoyed the accolades, the Judge always insisted on sharing the credit. In accepting his honorary degrees and other awards, the Judge always would say that his accomplishments were attributable not just to the Judge, but to the Judge *and company*, referring to his clerks, secretaries, and

ful he was able to receive and enjoy that acclaim during his lifetime. For so many great men and women, the praise comes too late. But Judge Wisdom was able to savor and enjoy it to the fullest. That is another reason for us to be thankful and joyful as we look back over his life.

But our greatest reason to be thankful and joyful is the legacy Judge Wisdom has left. Think of the lives he has touched and changed for the better: His colleagues on the Court of Appeals, his law clerks, the members of the bar who appeared before him or with whom he practiced in earlier years, and millions of ordinary Americans who never met or knew him, but who received from him the full stature of equal citizenship.

As Marty Feldman, the Judge's first law clerk, said in dedicating the Fifth Circuit court house to the Judge: "His life was a celebration of law and justice. His special life, his unspoiled brilliance, his perfect scholarship and statecraft mean just one beautiful thing: One person can make a difference."

What a difference it has been.

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other staff.

THE BURNITA SHELTON MATTHEWS MEMORIAL LECTURE IN LAW:

WOMEN IN THE LEGAL PROFESSION: THE PAST 100 YEARS

Presented by
Judge Phyllis A. Kravitch[*]

DEAN DAVIS:

Today's lecturer is the thirteenth in this distinguished lecture series. Our lecturer today honors this great lecture series and the woman for whom it is named. Established by bequest in the will of the late Percy A. Matthews, the lecturers honor the memory of the testator's noted wife, Burnita Shelton Matthews, who sat on the United District Court for the District of Columbia. Judge Matthews was a native Mississippian and the first women to serve in the United States as a federal district judge. After taking senior status in 1968, she continued her distinguished legal career for several more years. Today we honor her memory with the Spring 1999 Matthews Lecture.

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[*] Senior Judge on the Eleventh Circuit United States Court of Appeals. Originally appointed to the Fifth Circuit United States Court of Appeals in 1979, Judge Kravitch has been a member of the Eleventh Circuit since 1981.

I have the distinct privilege of introducing our lecturer today. She also has achieved a number of firsts that I will mention shortly. Judge Kravitch is a native of Savannah, Georgia. She received her undergraduate degree from Goucher College and her law degree from the University of Pennsylvania Law School, where she served on the editorial board of the *University of Pennsylvania Law Review*.

In an ironic twist, she was denied the opportunity to serve in federal and United States Supreme Court clerkships and to work with major law firms because of her sex. Ironic I say because that experience would help forge her resolve to spend a lifetime of commitment to the struggle for equal rights and equality of opportunity for minorities and women. She returned to her native Savannah where she engaged in a general trial practice from 1944 until 1976 at a time when there were no female judges, no women on juries, and very few female lawyers.

She did not shy away from controversy. She represented many indigent defendants in criminal cases and was active in civil rights litigation, including an attack on Georgia's white Democratic Primary. As a member of the Chatham County Board of Education from 1949 until 1955, she fought to eliminate sex- and race-based salary discrepancies and the use of substandard buildings for minority schools. She was active in establishing the Savannah Area Family Emergency Shelter for battered women and the Savannah Rape Crisis Center. She has served on the selection committee for the southeastern region for both Rhodes Scholars and White House Fellows, and she continues to serve on a selection committee for Truman Scholars for the southeastern region.

Despite practicing in a conservative legal community as a champion of underrepresented classes, Judge Kravitch won the respect of her peers. In 1975, she was elected the first female president of the Savannah Bar Association: one of the first women in the South to head a bar association. In 1976, she became the first female to be elected a Superior Court Judge in Georgia. In 1979 President Jimmy Carter appointed her to what was then the United States Court of Appeals for the Fifth Circuit, and she became the first woman to be appointed to the federal bench in the southeast and only the third woman to be appointed to the United States Court of Appeals in the country.

Judge Kravitch has earned several honors in her career, including an honorary degree of laws from her undergraduate alma mater, Goucher College, Savannah's most influential woman award in 1978, the National Council of Jewish Women's Hannah G. Solomon Award in 1978, the ABA's Margaret Brent Women Lawyers of Achievement Award in 1991, and the James Wilson Award from the University of Pennsylvania Law School in 1992, all in recognition of her life-long devotion to law and social justice.

And she just told me on the way down from Memphis today that last spring she was awarded an honorary degree from Emory University along with two other people: Zell Miller, who just finished his second term as Governor of Georgia and now is a visiting professor at the University of Georgia, and the Dalai Lama. What extraordinary company these two men find themselves in.

In her distinguished career on the federal bench, Judge Kravitch has authored many noteworthy opinions, but as I look over that list, two phrases keep jumping out at me: "In an opinion affirmed by the Supreme Court" and "in a case of first impression." Just to mention a couple of those, in *Sparks v. Pilot Freight Carriers, Inc.*,[1] a case of first impression decided in 1987, Judge Kravitch wrote the decision holding that a sexual harassment plaintiff in a Title VII action was not required to demonstrate the employer's liability for a supervisor's actions under a theory of respondeat superior where the plaintiff alleged that the employer had delegated authority to the supervisor to hire and fire, thus making the employer directly liable under Title VII. In another case, *United States v. Evans*,[2] which was affirmed by the Supreme Court, Judge Kravitch wrote the opinion holding that passive acceptance of a benefit by a public official would be sufficient to form the basis of a Hobbs Act violation if the official knew that he was being offered payment in exchange for a specific requested exercise of his official power. As an interesting aside, the prosecutor in that case was then U.S. Attorney, now Congressman, Bob Barr, recently of House Judiciary fame, or infamy, depending on your point of view. And in another case that doesn't fit under either of these two categories, *Walker v. Ford Motor Co.*,[3] a 1982 case, Judge Kravitch wrote the opinion holding that racially abusive language need not be directed at the plaintiff to form the basis of a Title VII cause of action. The court affirmed the judgment of the district court holding that the plaintiff's work environment was heavily charged with racial discrimination.

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[1] 830 F.2d 1554 (11th Cir. 1987).

Judge Phyllis Kravitch is truly a remarkable woman at a remarkable time in the South and on the Eleventh Circuit. She has enjoyed and continues to enjoy a distinguished career on the federal bench marked by intellect, integrity, and a devotion to the law. She was to have been our Matthews lecturer last spring, but family circumstances prevented her from joining us at that time. She honors us with her presence today. I am pleased to present our Matthews Lecturer for Spring 1999: the Honorable Phyllis A. Kravitch.

JUDGE KRAVITCH:

I am delighted to have the opportunity to participate in the Matthews lecture series. As you know, Judge Burnita Shelton Matthews was the first woman in the country to serve as a federal district court judge, having been appointed to the

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[2] 910 F.2d 790 (11th Cir. 1990).

[3] 684 F.2d 1355 (11th Cir. 1982).

District of Columbia bench fifty years ago. Because this lecture series was established in honor of Judge Matthews, someone who did much to advance the profile, opportunities and aspirations of women in the legal profession, I think it is appropriate to use my time today to give you an overview of the place of women in the legal profession during the past 100 years.

Women long ago proved themselves to be capable lawyers—it just took American society and the American legal profession a little over 300 years to accept this fact. Margaret Brent, who arrived in Maryland in 1638, is considered America's first woman lawyer. She was involved in 124 court cases during her career and eventually was named by the Maryland Council Attorney-in-Fact for Lord Baltimore. So skilled was Ms. Brent as a lawyer that the colonists often referred to her as "Gentleman Margaret Brent."

Despite this auspicious beginning, for the next two centuries the legal profession rejected the notion that women possessed the characteristics necessary to practice law.

After the establishment of the United States, the individual states enacted laws governing their citizens, including admission to practice law. Women, however, were excluded from the legal profession. It was not until 1869, some 200 years after the remarkable legal career of Margaret Brent, that Iowa became the first state to formally admit a woman, Arabella Mansfield, into its bar. The examiners reviewing Mansfield's application noted that her exam provided "the very best rebuke possible to the imputation that ladies cannot qualify for the practice of law." Although Iowa law limited admission to the bar to white male residents of Iowa, twenty-one years of age, who possessed the requisite learning, the Iowa judge handling Ms. Mansfield's application relied on another Iowa statute which held that "words importing the masculine gender only may be extended to females," and she was admitted. That same year, however, a woman in Illinois did not fare as well. Myra Bradwell, who had been taught by her husband, applied for admission to the Illinois bar. Although the examining judge and the State's Attorney both recommended that she was qualified, the Illinois Supreme Court rejected her application.

Ms. Bradwell challenged Illinois' decision, and the United States Supreme Court, in one of its more infamous decisions, affirmed the Illinois decision. In a concurring opinion, Justice Bradley wrote:

> "[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."[4]

These enlightened words came from the highest court in the land.

Despite these sexist decisions, Ms. Bradwell had a successful career. She became the founder and editor of the *Chicago Legal News* which became known for advocating the advancement of women's rights. In 1890, on its own initiative, the Illinois Supreme Court granted Ms. Bradwell a license to practice law.

While the states were divided over the wisdom of allowing women to practice law, the federal courts — often revered for their role as protectors of individual rights — were embarrassingly slow to recognize the rights and abilities of women lawyers. Given the views expressed by the Supreme Court in *Bradwell*, it is not particularly surprising that the Supreme Court refused to allow women to practice before it during this same period. In denying Belva Ann Lockwood's application to the Supreme Court bar in 1874, the Court issued the following ruling:

> By uniform practice of the Court, from its organization to the present time, and by the fair construction of its rule, none but

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[4] Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

> men are admitted to practice before it. . . . This is in accordance with immemorial usage in England, and the law and practice in all the states until within a recent period; and the court does not feel called upon to make a change, until such change is required by statute.[5]

Ms. Lockwood, however, did not stop with the United States Supreme Court. She drafted special legislation that provided for the admission of women to the federal courts. After two unsuccessful attempts, the third bill passed both houses and was signed into law by President Hayes in 1879. Later that year, Ms. Lockwood became the first woman to be admitted to and to appear before our nation's highest court.[6]

Despite the persistent notions that a woman's primary purpose in life is to raise a family, some of the formal barriers that had been used to exclude women from the legal profession began to recede in the early twentieth century. For example, by the time women achieved the right to vote in 1920, every state bar in the country allowed women to be admitted into the legal profession. The American Bar Association also opened its doors to women at this time. As a result, by the 1920s, women enjoyed significantly greater access into the field of law than previously.

The first woman lawyer to achieve national prominence by breaking down barriers to a judicial position was Florence Ellinwood Allen who left a legacy of "firsts."

After her graduation from NYU Law School, second in her class, she moved to Ohio where she became the first female assistant prosecutor in the country. Upon her hiring, the county prosecutor was reported as saying, "I consider that Miss Allen will do a man's job in our office. I rate her as the equal of virtually any male attorney."[7] Judge Allen also devoted considerable time advancing the women's rights movement in Ohio.

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[5] KAREN B. MORELLO, THE INVISIBLE BAR 33 (1986).

[6] Julia Davis, Belva Ann Lockwood, Remover of Mountains, 65 A.B.A. J. 927 (1979).

[7] JEANETTE E. TUVE, FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN (1984)

Within weeks after the Nineteenth Amendment was ratified by the states in 1920 and she became eligible to run for office, Allen successfully ran for a seat on the Court of Common Pleas and became the first woman in the nation to sit on a court of general jurisdiction. Two years later she was elected to the Ohio Supreme Court in 1922, becoming the first woman member of a state court of last resort. In 1928, she was re-elected by a landslide.

In 1934, Judge Allen achieved another "first" when she was appointed to the United States Court of Appeals for the Sixth Circuit by President Roosevelt and thus became the first woman in America to serve as a federal Article III judge. She later served as chief judge of that court. To say that she received a very cool reception from her new colleagues is a gross understatement. In addition to one judge who, it is reported, was so upset at the idea of a female colleague that he literally took to his bed for several days, three of the remaining five judges refused to offer her congratulations. Once a member of the Sixth Circuit, Judge Allen continued to suffer from social isolation. During court sessions, her male colleagues dined together each day at the University Club, a private club that excluded women, while she ate lunch alone in her office. A member of the Sixth Circuit told me that years later, during some renovation of the courthouse, on a top shelf in a closet someone found a hot-plate used by Judge Allen to prepare her solitary meals.

Despite the social exclusion, Judge Allen gradually earned respect from her fellow judges and from the legal profession as an outstanding jurist. Because of this reputation she seriously was considered by President Roosevelt for appointment to the United States Supreme Court. President Truman also considered elevating her to the Supreme Court, but was dissuaded by several Justices who were concerned that the presence of a woman might interfere with the collegiality of the Court. One would expect that Judge Allen's accomplishments soon would have opened the doors of the judiciary to other women. Not so. It was thirty-three years before a second woman was appointed a federal Circuit Judge, and another eleven years before I became the third. President Truman named Burnita Matthews as the first female federal district judge in 1949; yet in the ensuing thirty years only four more women were named to the district court bench. And there were few women on state court benches.

Although more women were beginning to enter the profession, the pace of progress was painfully slow. The attitude of the legal profession, for the most part, mirrored the prevailing culture that a woman's proper role was that of a wife, mother, and homemaker and that the legal profession was ill suited for women because they supposedly did not possess either the intellectual ability or emotional or physical strength to excel in the practice of law.

By the 1940s practically all law schools were admitting women, although on a limited basis. When I attended the University of Pennsylvania, I was one of two women in my class. Harvard excluded women until the 1950s. Former Congresswoman Martha Griffiths had planned to attend law school when she finished college. Her fiancé had been accepted at Harvard Law School, but because Harvard would not accept women he withdrew and they both enrolled in another school. An interesting footnote to history is that years later Griffiths was the member of Congress who introduced the Equal Rights Amendment.

Even schools that admitted women did not always treat them as intellectual equals. Professors were always white males, and male students usually dominated classroom discussions. In one prestigious school women were only called on to recite on designated "ladies days." I fared better at Penn as there was only one professor who refused to call on me. As an illustration, let me relate one incident I remember well. It was football season, and most of the class had spent the weekend attending the football game and festivities. Having never been a football fan, I had spent the weekend preparing for next week's classes. In class the following Monday, the professor called on two or three young men who unsuccessfully bumbled through their answers. Finally in exasperation the professor asked, "Is anyone prepared to recite on this case?" I thought, "My time has come." I stood up and stated that I would like to recite. He gave me a scathing glance and announced, "Since no one is prepared, I will discuss the case myself." I sank back into my seat to an undercurrent of laughter.

By contrast, another professor did call on the women. One day, after several students had given erroneous answers, he looked over and asked how I would analyze the case. I told him what I thought, and he smiled and said, "Exactly, exactly." Then, shaking his head from side to side, he looked at the class and remarked, "Gentlemen, gentlemen, aren't you ashamed?"

I am telling you about these incidents because they would not happen today. But this illustrates how much has changed in just the past fifty years.

Those women who survived the virtually all-male bastions of law schools during the mid-twentieth century faced extremely limited opportunities upon graduation because few firms would consider hiring a woman. Sandra Day O'Connor relates that although she finished Stanford second in her class, the only job offer she received was that of a legal secretary.

When I graduated, although I was on Law Review and near the top of my class, no firm would even interview me. I therefore was elated to be granted an interview for a clerkship with a Justice of the United States Supreme Court. At the interview, however, he candidly told me that his first offer would be to another applicant, a male, who the Justice assured me, was no better qualified, but that the Court had never had a female clerk and he hesitated to be the one to break precedent. As a consolation prize, I was invited to remain after the interview for the Justice's birthday celebration with his colleagues and to slice the cake. In another interview a district court judge assured me that he had no qualms about hiring a female clerk and that if he was not able to find a young man as well qualified as I that he would certainly offer me the position. Needless to say he hired a male clerk.

Unlike many other women who graduated during this period, I was very fortunate to have a father who practiced law in Savannah, Georgia, and I returned home to practice with him. He refused to cater to the prejudices of the members of the local bench and bar, most of whom were less than enthusiastic at the idea of a woman in the courtroom. Years later he would claim that he was the first Equal Opportunity Employer in the South.

During the 1960s and 1970s, several changes occurred that accelerated the entry of women into the legal profession. First, the social revolution of the 1960s catapulted women into all types of professional roles as the notion that certain professions were off-limits to women began to recede. Also, Congress began to address the problem of sex discrimination. In 1964, it adopted Title VII of the Civil Rights Act, which outlawed many gender-based employment practices. In 1972, Congress passed Title IX, which prohibited gender discrimination in educational institutions. This legislation helped open the law school doors to many more female students and forced law schools to try to attract more female faculty.

As Congress was providing legislative weapons to female professionals and students, the Supreme Court began to revisit its prior use of outdated stereotypes to validate gender-based legislation. In 1971, in *Reed v. Reed*,[8] the Court struck down under the Equal Protection Clause, a statute which gave preference to males in the selection of administrators for intestate estates. This case marked a turning point in the Court's jurisprudence; no longer could general stereotypes regarding the differences between men and women be used to justify disparate treatment.

In one case of particular interest to the legal community, *Hishon v. King & Spalding*,[9] the Court ruled that Title VII prohibited a law firm from denying associates entry into partnership on the basis of gender. Justice Powell's concurring opinion illustrates how far the Supreme Court's jurisprudence had evolved since the *Bradwell* decision. Justice Powell wrote:

> The qualities of mind, capacity to reason logically, ability to work under pressure, leadership, and the like are unrelated

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[8] 404 U.S. 71 (1971).

[9] 467 U.S. 69 (1984).

> to race or sex. This is demonstrated by the success of women and minorities in law schools, in the practice of law, on the bench, and in positions of community, state, and national leadership. Law firms — and, of course, society — are the better for these changes.[10]

As Congress and the courts began to provide women lawyers weapons in opening the legal profession to real opportunity, President Carter was embarking upon a historic change in the way federal judges were appointed. The appointment of women to the federal bench had been remarkably slow in coming. Although Judge Allen had been appointed in 1934, it was not until 1968 that President Johnson appointed a second woman, Shirley Hufstedler, to the Ninth Circuit. But Judge Hufstedler, like Judge Allen, served as the sole female on the Court of Appeals until President Carter appointed me to the circuit court in 1979. Also, prior to President Carter, only 4 women other than Judge Matthews had been appointed to the federal district bench.

President Carter, using a merit selection committee system in each Circuit to evaluate potential appointees, drastically changed the makeup of the federal bench. During his four years as President, he named forty-one women to the federal bench, eleven to the Court of Appeals and thirty to the district courts. In all, roughly sixteen percent of the federal judges named to the federal bench under President Carter were women. The dramatic increase in the number of female federal judges shattered the widely held notion that only men had the requisite intellect and judicial temperament. Although the judiciary represents only a small percentage of lawyers, its high visibility affects public perception. Probably the most important *single* event affecting acceptance of women's equality in the legal profession was the appointment by President Reagan of Sandra Day O'Connor to the United States Supreme Court.

Despite these gains, however, outdated stereotypes still existed. I remember my interview with President Carter's merit selection committee for the position on the former Fifth Circuit Court of Appeals. I was a state court judge at the time, and I felt honored to even be considered for appointment to a court that included such judges as Elbert Tuttle and John Minor Wisdom and a little intimidated at the thought of sharing the bench with such judicial giants. I arrived early for my scheduled appointment with the committee and was waiting in the reception area for my interview when a gentlemen entered the room and asked me to make a cup of coffee for him. On second thought, he said, I should make a whole pot full. I responded that I would be glad to make the coffee if he would show me where the supplies were kept. "Don't you work here?" he asked. I informed him that I did not, that I was there for an appointment. Later, when I entered the interview room, I was surprised to see that he was a member of the committee. He apologized and told the other members of the mistake he had made. He explained that he knew the committee was interviewing only judges during the morning session, and he assumed that because I was a woman I must have been a receptionist or secretary, but certainly not a judge.

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[10] *Hishon*, 467 U.S. at 81 (Powell, J., concurring).

Even after coming on the Circuit Court of Appeals, I occasionally encountered lawyers and litigants who were reluctant to accept or to recognize that a woman could serve as a federal judge. During my first month on the court, I was in New Orleans for a panel of the Fifth Circuit, and one rainy morning I was in line at the hotel entrance for a taxi to take me to the courthouse. As my turn arrived, two men came rushing out of the hotel and, literally pushing me out of the way, grabbed the cab. When I objected, one man retorted that they had an important engagement. I finally arrived at the courthouse and took my place on the bench. The two men who had grabbed my cab were the lawyers for appellants in the first case. The one actually arguing the case was so embarrassed that he could hardly utter a word in response to the panel's first few questions. I am sure that it never occurred to them that the woman whose cab they took also had an important engagement.

The past twenty years have seen an unprecedented escalation not only in the number of women in the legal profession, but in their place in the profession as a whole. Today in the majority of law schools women comprise fifty percent of the class. Today two women are on the United States Supreme Court, and a woman is the country's Attorney General. There are now thirty-seven women on the Federal Courts of Appeals and 126 women on the district courts, comprising approximately twenty percent of the Federal Judiciary, and there is an equal percentage of bankruptcy judges and magistrate judges. On the state level, women judges comprise twenty-four percent of courts of last resort; in fact, all but four states have at least one woman on the highest court. On state lower courts the percentages are about the same. Although it has taken longer for women to become partners in law firms, according to statistics compiled two years ago, the percentage of women partners was approximately fifteen percent. With the large number of women entering law firms, however, these percentages also will continue to increase. And although the number of women on the faculties of law schools is, in most instances, less than that of male professors, this too is changing. The public perception of the place of women in the profession also has changed, to a certain extent influenced by movies and television productions in which women are cast as lawyers and judges.

Although the blatant prejudices that women pioneers found in the legal profession earlier have all but disappeared, there are more subtle barriers confronting women lawyers today. Women continue to be mainly responsible for family and child-care obligations, and the legal profession has been slow to respond to this reality. There are fewer established women mentors for young women lawyers. And, unfortunately, women lawyers are still subject to sexual advances and harassment in their places of employment. Stereotypes that women lack the toughness and competitiveness to excel in the rigorous practice of courtroom and corporate law, although diminishing, still exist to a certain extent.

These obstacles are less conspicuous than those faced by female lawyers decades ago but, nonetheless, curtail some employment opportunities for women and prolong gender inequality in the profession. And, although women in the legal profession have made remarkable progress in the last twenty years, no one can be complacent until these final obstacles to equality have been removed. As women continue to strive for true equality within the legal profession, we all should remember and be grateful for pioneers such as Judge Matthews and Judge Allen, who are responsible in great measure for opening the profession to those previously excluded and which has enhanced the profession for everyone.

CONTRACT CONSTRUCTION AND INTERPRETATION: FROM THE "FOUR CORNERS" TO PAROL EVIDENCE (AND EVERYTHING IN BETWEEN)

Keith A. Rowley[*]

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The pervasive use of computers has revolutionized both the practice of law and the conduct of business. Agreements once performed on the basis of an oral promise or a hand shake, at one end of the spectrum, or only following lengthy negotiations and exchanges of drafts of documents which had to be recreated from scratch at each stage, at the other, often are now governed by writings prepared with minimal effort, based on a computerized form used by a party to the contract, or its attorneys, in some prior deal. The ease of "block and copy" drafting of contracts and similar instruments, and the often corresponding decrease of close attention paid to any particular agreement in the drafting stage, increases the potential for misunderstanding among the parties to those agreements when the time comes for them to perform. When litigation results, the threshold issues for the parties, their counsel, and the court are often the same: What are the complete terms of the parties' agreement? What was the parties' intent in entering into the agreement? And, how can we prove (or challenge) said terms and intent?

In Mississippi, as in every jurisdiction, a considerable body of law governs the resolution of these questions. Many separately articulated—if not always well defined—interpretational guides and evidentiary principles apply. This article explores the process and the rules used by Mississippi courts to determine and effectuate contractual intent, as well as the circumstances under which Mississippi courts and juries may consider evidence beyond the "four corners" of the written instrument. This discussion is relevant to practically every negotiation, drafting session, lawsuit, and settlement involving the written word.[1] For that reason, attorneys responsible for drafting legal documents, as well as those who handle litigation concerning them, should benefit from this examination—the former by being alerted to the many pitfalls associated with imprecise or incomplete draftsmanship, and the latter by being better prepared to litigate the consequences of imprecise or incomplete draftsmanship. This article should also prove useful to the judges before whom these disputes come and those whose interest in the process of giving meaning and consequence to written agreements is more academic.

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[1] While much of the discussion in this article focuses on written contracts, with certain exceptions—some of which will be discussed later, and some of which are beyond the scope of this article—many of the same rules and guides used to construe and interpret written contracts, and to apply the parol evidence rule to written contracts, also pertain to, *inter alia*, antenuptial (or "prenuptial") agreements, *see, e.g.*, Smith v. Smith, 656 So. 2d 1143 (Miss. 1995), bills of lading, *see, e.g.*, Yazoo & Miss. Valley R.R. v. Nichols & Co., 83 So. 5 (Miss. 1919), *aff'd*, 256 U.S. 540 (1921), certificates of deposit, *see, e.g.*, Wallace v. United Mississippi Bank, 726 So. 2d 578 (Miss. 1998); Cooper v. Crabb, 587 So. 2d 236 (Miss. 1991), corporate charters, *see, e.g.*, Mississippi Power & Light Co. v. Capital Elec. Power Ass'n, 222 So. 2d 399 (Miss.), *appeal dismissed*, 396 U.S. 113 (1969), deeds, *see, e.g.*, Peoples Bank & Trust Co. v. Nettleton Fox Hunting & Fishing Ass'n, 672 So. 2d 1235 (Miss. 1996); Baker v. Columbia Gulf Transmission Co., 218 So. 2d 39 (Miss. 1969), covenants not to compete, *see, e.g.*, Landry v. Moody Grishman Agency, Inc., 181 So. 2d 134 (Miss. 1965), divorce decrees, *see, e.g.*, Norton v. Norton, 742 So. 2d 126 (Miss. 1999); Crist v. Lawrence, 738 So. 2d 267 (Miss. Ct. App. 1999), easements, *see, e.g.*, Bivens v. Mobley, 724 So. 2d 458 (Miss. Ct. App. 1998), guaranty agreements, *see, e.g.*, Turnbough v. Steere Broad. Corp., 681 So. 2d 1325 (Miss. 1996), indemnity agreements, *see, e.g.*, Heritage Cablevision v. New Albany Elec. Power Sys., 646 So. 2d 1305 (Miss. 1994); Blain v. Sam Finley, Inc., 226 So. 2d 742 (Miss. 1969), indorsements, *see, e.g.*, Hawkins v. Shields, 57 So. 4 (Miss. 1912), insurance policies, *see, e.g.*, Universal Underwriters Ins. Co. v. Buddy Jones Ford, Lincoln-Mercury, Inc., 734 So. 2d 173 (Miss. 1999), leases, *see, e.g.*, IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96 (Miss. 1998); Malsbury v. State Hwy. Comm'n, 161 So. 2d 649 (Miss. 1964), marital property settlements, *see, e.g.*, Roberts v. Roberts, 381 So. 2d 1333 (Miss. 1980), mortgages, *see, e.g.*, United Miss. Bank v. GMAC Mortgage Co., 615 So. 2d 1174 (Miss. 1993), negotiable instruments, *see, e.g.*, Wilkins v. Bancroft, 193 So. 2d 571 (Miss. 1966), partnership divisions, *see, e.g.*, McKee v. McKee, 568 So. 2d 262 (Miss. 1990), promissory notes, *see, e.g.*, Estate of Parker v. Dorchak, 673 So. 2d 1379 (Miss. 1996); Gilchrist Tractor Co. v. Stribling, 192 So. 2d 409 (Miss. 1966), purchase options, *see, e.g.*, Busching v. Griffin, 542 So. 2d 860 (Miss. 1989); releases,

I. THE GOAL OF CONSTRUCTION AND INTERPRETATION

Divining the intent of the parties is the first rule of contract construction.[2]

In construing and interpreting a written contract,[3] a

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see, e.g., Ellis v. Powe, 645 So. 2d 947 (Miss. 1994), restrictive covenants, *see, e.g.*, Griffin v. Tall Timbers Dev., Inc., 681 So. 2d 546 (Miss. 1996); Kemp v. Lake Serene Property Owners Ass'n, 256 So. 2d 924 (Miss. 1971), scholarship certificates, *see, e.g.*, Weeks v. Mississippi College, No. 98-CA-00245-COA, 1999 WL 410552 (Miss. Ct. App. June 22, 1999), security agreements, *see, e.g.*, Kelso v. McGowan, 604 So. 2d 726 (Miss. 1992); Ford Motor Credit Co. v. State Bank & Trust Co., 571 So. 2d 937 (Miss. 1990), settlement agreements, *see, e.g.*, Meek v. Warren, 726 So. 2d 1292 (Miss. Ct. App. 1998), surety agreements, *see, e.g.*, Alexander v. Fidelity & Cas. Co., 100 So. 2d 347 (Miss. 1958), trusts, *see, e.g.*, Hart v. First Nat'l Bank of Jackson, 112 So. 2d 565 (Miss. 1959); Hart v. First Nat'l Bank of Jackson, 103 So. 2d 406 (Miss. 1958), warranties, *see, e.g.*, Ford Motor Co. v. Olive, 234 So. 2d 910 (Miss. 1970), and wills, *see, e.g.*, Estate of Williams v. Junius Ward Johnson Mem'l Young Men's Christian Ass'n, 672 So. 2d 1173 (Miss. 1996), including joint and mutual wills, *see, e.g.*, Monroe v. Holleman, 185 So. 2d 443 (Miss. 1966). As such, this Article – beyond its value to legal scholars, law students, judges, and their law clerks – should interest not only "contract lawyers" but also lawyers who specialize in, *inter alia*, family law, estate planning, general civil litigation, financial services, insurance, and real property transactions. For the sake of simplicity, this Article will use "contract" or "instrument" as default terms, unless the circumstances dictate otherwise.

[2] Freeman v. Greenville Convalescent Home, Inc., No. 96-CA-00466-COA, 1998 WL 881772, at *5 (Miss. Ct. App. Dec. 18, 1998).

[3] To paraphrase Professor Corbin, "interpretation" is the process of determining the meaning of the words and symbols used in the contract, while "construction" is the process of determining the legal effect of those words and symbols in light of many factors external to the contract itself. 3 ARTHUR L. CORBIN, CORBIN

court's primary concern is to ascertain and give effect to the mutual intent of the parties at the time of contracting.[4] A

ON CONTRACTS § 534, at 7-9 (1960); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 200 (1981) ("Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning."); *id.* § 200 cmt. c, at 82 ("Interpretation is not a determination of the legal effect of words or other conduct."); *id.* § 200 note, at 82 (noting that Section 200 "rephrase[s]" Section 226 of the first *Restatement of Contracts* "to make it clear that 'interpretation' relates to meaning," whereas "construction" relates to "the ascertainment of legal operation or effect"); E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.7, at 255-56 (2d ed. 1998); 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.3, at 7-11 (Joseph M. Perillo ed., rev. ed. 1998). *See generally* Robert Braucher, *Interpretation and Legal Effect in the Second Restatement of Contracts*, 81 COLUM. L. REV. 13 (1981); E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939 (1967); Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964).

In practice courts often blur the line between construction and interpretation, frequently using the terms interchangeably. *See* FARNSWORTH, *supra*, § 7.7, at 256 ("Although courts have sometimes endorsed this distinction, they have often ignored it by characterizing the process of construction as that of 'interpretation' . . . .") (footnote omitted); Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 52 n.79 (1995) (remarking that the distinction between construction and interpretation "proves difficult to maintain, and courts have largely ignored it"). *See generally* RESTATEMENT (SECOND) OF CONTRACTS ch. 9 intro. note, at 81 ("[S]tating separately rules with respect to various aspects of the process [of interpreting and applying agreements] may convey an erroneous impression of the psychological reality of the judicial process in which many elements are typically combined in a single ruling.").

Nonetheless, the distinction between construction and interpretation is pedagogically useful, in that it helps us understand what courts do with written contracts (even if the courts themselves are not cognizant of the distinction between determining the meaning of the parties' words and their legal consequences). Thus, we may distinguish between the "[i]nterpretation of words and of other manifestations of intention forming an agreement, or having reference to the formation of an agreement," and "the process of determining from such manifestations what must be done or forborne by the respective parties in order to conform to the terms of the contract or agreement." Williams v. Batson, 187 So. 236, 238 (Miss. 1939) (en banc). Some contracts must be interpreted by courts, others need not be. All contracts that come before a court must be construed. Even if a writing requires no interpretation because the objective meaning of the words and symbols used is sufficiently clear, the court must still construe the writing before giving it legal effect.

That said, the discussion in Part II of this article treats construction and interpretation as an integrated process, and does not try to distinguish "rules of construction" from "rules of interpretation." In the words of Professor Corbin: "[T]he construction of a contract starts with the interpretation of its language but does not end with it . . . ." 3 CORBIN, *supra*, § 534, at 9.

[4] *See Wallace*, 726 So. 2d at 586; *Heritage Cablevision*, 646 So. 2d at 1312;

Mississippi court—which, for purposes of this article, will also include any court considering a written agreement subject to Mississippi law[5]—must give effect to the objective intent of the parties as it is expressed or apparent in writing, as opposed to the subjective intent of parties who failed to fully capture their intent when they wrote the contract in question.[6] In so doing, the court must consider not only the mean-

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Kight v. Sheppard Bldg. Supply, Inc., 537 So. 2d 1355, 1358 (Miss. 1989); Stabiler v. Webb, 375 So. 2d 980, 984 (Miss. 1979); United States Fidelity & Guar. Co. v. Parsons, 122 So. 544, 548 (Miss. 1929); *Freeman*, 1998 WL 881772, at *5 (mutual intent of parties "primary rule" of contract interpretation).

[5] The rules of contract construction and interpretation, as well as the parol evidence rule, are all rules of substantive law. *See, e.g.*, Cox v. Howard, Weil, Laboussie, Friedrichs, Inc., 619 So. 2d 908, 912 (Miss. 1993); Kendrick v. Robertson, 111 So. 99, 101-02 (Miss. 1927). Thus, federal courts, as well as state courts in other jurisdictions, asked to construe and interpret contracts subject to Mississippi law are bound by Mississippi law. *See, e.g.*, H & W Indus., Inc. v. Occidental Chem. Corp., 911 F.2d 1118, 1120-23 (5th Cir. 1990); Carlo Corp. v. Casino Magic of La. Corp., 26 F. Supp. 2d 904, 907-09 (S.D. Miss. 1998); Galata v. Turner, 602 So. 2d 794, 796-97 (La. Ct. App. 1992). *See generally* HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 7.b, at 7-11 (1989).

[6] *See* Cherry v. Anthony, Gibbs, Sage, 501 So. 2d 416, 419 (Miss. 1987) ("The most basic principle of contract law is that contracts must be interpreted by objective, not subjective standards. A court must effect a determination of the meaning of the language used, not the ascertainment of some possible but unexpressed intent of the parties." (quotation omitted)); *accord* IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 104 (Miss. 1998); Burton v. Choctaw County, 730 So. 2d 1, 6 (Miss. 1997); Century 21 Deep South Properties, Ltd. v. Keys, 652 So. 2d 707, 718 (Miss. 1995); *Heritage Cablevision*, 646 So. 2d at 1312-13; Simmons v. Bank of Miss., 593 So. 2d 40, 42-43 (Miss. 1992); Pursue Energy Corp. v. Perkins, 558 So. 2d 349, 351 (Miss. 1990); Osborne v. Bullins, 549 So. 2d 1337, 1339 (Miss. 1989); UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc., 525 So. 2d 746, 754 (Miss. 1987); Rogers v. Morgan, 164 So. 2d 480, 484 (Miss. 1964); *In re* Estate of Huddleston, No. 97-CA-01080-COA, 1999 WL 30541, at *3 (Miss. Ct. App. Jan. 26, 1999).

As the Mississippi Supreme Court explained thirty-five years ago:

> Generally speaking, the cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. Whatever may be the inaccuracy of expression or the inaptness of the words used in an instrument in a legal view, if the intention of the parties can be clearly discovered, the court will give effect to it and construe the words accordingly. It must not be supposed, however, that an attempt is made to ascertain the actual mental processes of the parties to a particular contract. The law presumes that the parties understood the import

ing of the terms chosen by the parties to it, but also the legal consequence of those terms.

II. THE PROCESS OF CONSTRUCTION AND INTERPRETATION

> *This Court must seek the meaning most coherent in principle with the best justification which may be found for that language.*[7]

Over time, courts and scholars have recognized certain "rules" or "maxims" of construction and interpretation to guide courts and litigants in their efforts to give effect to the parties' mutual intention at the time of contracting. These rules appear in no code, and there is less than universal agreement among courts and commentators as to whether all of the maxims set forth below are legitimate guides to construction and as to what priorities, if any, courts are to observe among the various rules.

The prevailing view among American courts and commentators is that a court need not find ambiguity[8] or less-than-

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> of their contract and that they had the intention which its terms manifest. It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument. This language must be sufficient, when looked at in the light of such facts as the court is entitled to consider, to sustain whatever effect is given to the instrument. Taking into consideration this limitation, it may be said that the object of all rules of interpretation is to arrive at the intention of the parties as it is expressed in the contract. In other words, the object to be attained in interpreting a contract is to ascertain the meaning and intent of the parties as expressed in the language used.

Byrd v. Rees, 171 So. 2d 864, 867-68 (Miss. 1965); *see also* Cooper v. Crabb, 587 So. 2d 236, 241 (Miss. 1991) ("[L]egal purpose or intent should first be sought in an objective reading of the words employed, to the exclusion of parol or extrinsic evidence. Courts are not at liberty to infer an intent contrary to that emanating from the text at issue.").

[7] Lehman-Roberts Co. v. State Hwy. Comm'n, 673 So. 2d 742, 744 (Miss. 1996) (paraphrasing *Simmons*, 593 So. 2d at 43). What could be clearer?

[8] *See infra* subpart II.A.

full integration[9] before it may apply these rules of construction and interpretation to determine the meaning and consequence of the parties' written agreement. Rather, a trial court may—indeed, should—use these rules, along with all relevant evidence, to ascertain the existence of an ambiguity or a less-than-fully integrated agreement, in the first place, as well as to resolve any such ambiguity or fill the "gaps" created by partial integration once identified.[10]

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[9] *See infra* subpart II.B.

[10] *See, e.g.*, Hibbett Sporting Goods, Inc. v. Biernbaum, 375 So. 2d 431, 434 (Ala. 1979); Neal & Co. v. Association of Village Council Presidents Reg'l Hous. Auth., 895 P.2d 497, 504 (Alaska 1995); Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 398 (Ariz. 1984); Shawmut Bank Connecticut, N.A. v. Connecticut Limousine Serv., Inc., 670 A.2d 880, 884 (Conn. App. Ct.), *cert. denied*, 673 A.2d 1143 (Conn. 1996); Sutton v. Banner Life Ins. Co., 686 A.2d 1045, 1050 (D.C. 1996); First Nat'l Bank of Creston v. Creston Implement Co., 340 N.W.2d 777, 781 (Iowa 1983); Starr v. Fordham, 648 N.E.2d 1261, 1269 (Mass. 1995); Garden State Plaza Corp. v. S.S. Kresge Co., 189 A.2d 448, 454-55 (N.J. Super Ct. App. Div.), *cert. denied*, 191 A.2d 63 (N.J. 1963); C.R. Anthony Co. v. Loretto Mall Partners, 817 P.2d 238, 242-43 (N.M. 1991); Production Credit Ass'n of Fargo v. Ista, 451 N.W.2d 118, 126 (N.D. 1990); Abercrombie v. Hayden Corp., 883 P.2d 845, 853 (Or. 1994); Stewart v. Selder, 473 S.W.2d 3, 7 (Tex. 1971); Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 268 (Utah 1995); New England Educ. Training Serv., Inc. v. Silver Street Partnership, 595 A.2d 1341, 1344 (Vt. 1991); Emrich v. Connell, 716 P.2d 863, 866 (Wash. 1986) (en banc); FARNSWORTH, CONTRACTS, *supra* note 3, § 7.3, at 216-22, § 7.10, at 275-76; JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 3.3, at 128, § 3.12, at 153-54 (4th ed. 1998); JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 84, at 384-85, § 86, at 406-08 (3d ed. 1990); Mark K. Glasser & Keith A. Rowley, *On Parol: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657, 664-69, 700-01, 707-09 (1997); Margaret N. Kniffin, *A New Trend in Contract Interpretation: The Search for Reality as Opposed to Virtual Reality*, 74 OR. L. REV. 643, 649-63 (1995); Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 189-90 (1965); *see also* R. Wayne Estes & Kirsten C. Love, *The Ubiquitous Yet Illusive "Merger" Clause in Labor Agreements: Semantics, Applications, and Effect on Past Practice*, 87 KY. L.J. 1, 14 (1999) ("[I]f a valid contract was entered into, it must then be determined if the written contract was the final expression of the agreement between the parties . . . . [A]ny relevant evidence may be used to determine if the agreement was a final expression of the parties because the parol evidence rule does not apply to this inquiry."); Harry G. Prince, *Contract Interpretation in California: Plain Meaning, Parol Evidence and Use of the "Just Result" Principle*, 31 LOY. L.A. L. REV. 557, 570 & n.67 (1998) ("The California courts repeatedly apply a contextual analysis in determining how to interpret contracts."). *See generally* Eyal Zamir, *The Inverted*

This "modified objectivist,"[11] or "contextual," approach underlies both the *Restatement (Second) of Contracts*[12] and the Uniform Commercial Code.[13] According to the *Restatement (Second)*, which was informed by and took account for the Code's treatment of these issues,[14] the questions of whether and to what extent a writing is integrated and whether it is unambiguous are questions of fact, to be determined by the trial judge based on all relevant evidence—including, but not limited to, the circumstances surrounding the formation of the contract—and in light of the relevant rules of construction and interpretation.[15] As a threshold matter, the trial judge determines, based on all relevant evidence, whether and to what extent the writing is integrated.[16] In the absence of integration, ambiguity is irrel-

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Hierarchy of Contract Interpretation and Supplementation, 97 COLUM. L. REV. 1710 (1997).

[11] *See* CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 422-23 (4th ed. 1999); KNIFFIN, *supra* note 3, § 24.6, at 25-30.

[12] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 200-03, 209-10, 212-16 (1981). *See infra* notes 15-20 and accompanying text for a more detailed discussion of the *Restatement* approach.

[13] *See* MISS. CODE ANN. § 75-2-202 (1981); UNIFORM COMMERCIAL CODE § 2-202 cmt. 1 (1995); *infra* subpart III.D; *see also* Larry T. Garvin, *The Changed (and Changing?) Uniform Commercial Code*, 26 FLA. ST. U. L. REV. 285, 347 & n.378 (1999) ("[A]s a number of courts and commentators have observed, the Article 2 parol evidence rule [i]s itself substantially a rejection of the old four-corners approach to parol evidence.") (citing *e.g.*, Barbara Oil Co. v. Kansas Gas Supply Corp., 827 P.2d 24, 35 (Kan. 1992), Herman Oil, Inc. v. Peterman, 518 N.W.2d 184, 188 (N.D. 1994), Sundlun v. Shoemaker, 617 A.2d 1330, 1334 (Pa. Super. Ct. 1992), and 2 FARNSWORTH, *supra* note 3, § 7.3, at 216)).

See generally infra subpart II.D for a discussion of parol evidence and construction and interpretation issues under the Uniform Commercial Code.

[14] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. g, at 90; *id.* § 202 reporter's note, at 91; *id.* § 203 cmt. d, at 94; *id.* § 203 reporter's note, at 96; *id.* § 209 cmt. c, at 116; *id.* § 209 reporter's note, at 117; *id.* § 210 cmt. a, at 118; *id.* § 212 reporter's note, at 128; *id.* § 216 cmt. a, at 137.

[15] *See infra* notes 16, 19-20.

[16] *See* RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. c, at 116 ("Whether a writing has been adopted as an integrated agreement is a question of fact to be determined in accordance with all relevant evidence . . . . Ordinarily the issue whether there is an integrated agreement is determined by the trial judge in the first instance as a question preliminary to an interpretative ruling or to the ap-

evant, and the parol evidence rule will not apply to prohibit the parties from presenting extrinsic evidence to the trier of fact, who will be charged with determining the existence, terms, and effect of the parties' agreement.[17] If the trial judge finds that the writing is partially or fully integrated, the next question is whether it is ambiguous—that is, whether the words of the partially or fully integrated writing are reasonably susceptible to more than one legal meaning.[18] This, too, the trial judge decides based on all relevant evidence.[19] In

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plication of the parol evidence rule."); *id.* § 210 cmt. c, at 118-19 ("Partial integration . . . . may be shown by any relevant evidence, oral or written . . . ."); *see also id.* § 209 reporter's note, at 117 ("[A]ll relevant evidence, including evidence extrinsic to the document in question, is admissible on the issue whether the parties intended the document to be integrated . . . ."); *id.* § 210 cmt. b, at 118 ("That a writing was or was not adopted as a completely integrated agreement may be proved by *any relevant evidence* . . . . and wide latitude must be allowed for inquiry into the *circumstances bearing on the intention of the parties.*" (emphases added)); *id.* § 214(a)-(b) ("Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish (a) that the writing is or is not an integrated agreement; (b) that the integrated agreement, if any, is completely or partially integrated . . . ."); *id.* § 214 cmt. a, at 133 ("Writings do not prove themselves . . . . The preliminary determination [as to integration] is made in accordance with all relevant evidence, including the circumstances in which the writing was made or adopted.").

[17] *See, e.g.*, Walley v. Bay Petroleum Corp., 312 F.2d 540, 543-44 (5th Cir. 1963) (applying Mississippi law); *see also* Matthews v. Drew Chem. Corp., 475 F.2d 146, 148-50 (5th Cir. 1973) (applying Florida law); *infra* note 669 and accompanying text.

[18] *See infra* note 30 and accompanying text.

[19] *See* RESTATEMENT (SECOND) OF CONTRACTS § 212(1) ("The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings *in light of the circumstances* . . . ." (emphasis added)); *id.* § 212 cmt. b ("[T]he rule stated in [§ 212(1)] is not limited to cases where it is determined that the language used is ambiguous. *Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.*" (emphasis added)); *id.* § 214(c) ("Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . (c) the meaning of the writing, whether or not integrated . . . ."); *id.* § 214 cmt. b ("Words, written or oral, cannot apply themselves to the subject matter. The expressions and general tenor of speech used in negotiations are admissible to show the conditions existing when the writing was made, the application of the words, and the meaning or meanings of the parties. *Even though words seem on their face to have only a single possible meaning, other*

making these threshold determinations of integration and ambiguity, the trial court should also consider the relevant rules of construction and interpretation.[20]

This view, however, is by no means universal. A minority of courts and commentators adhere to a more "objectivist" approach,[21] which purports to require a judge to determine the existence of ambiguity and the presence and extent of integration by looking solely at what appears within the written contract itself—a "four corners" test, so to speak.[22] The preponderance of published Mississippi Supreme Court and Mississippi Court of Appeals cases discussing the construction and interpretation of contracts tend toward the "objectivist" approach, requiring that the court make a threshold finding that the "four corners" of the instrument reveal some lack of integration or some ambiguity (or both) before the court may resort to any interpretational aids.[23]

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meanings often appear when the circumstances are disclosed." (emphasis added)); *see also id.* § 202(1) ("Words and other conduct are interpreted in the light of all circumstances . . . ."); *id.* § 202 cmt. b ("The meaning of words and other symbols commonly depends on their context . . . . In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position they occupied at the time the contract was made . . . ."); *id.* § 209 cmt. a ("[B]oth integrated and unintegrated agreements are to be read in the light of the circumstances and may be explained or supplemented by operative usages of trade, by the course of dealing between the parties, and by the course of performance of the agreement.").

[20] *See id.* § 202 cmt. a ("The ["Rules in Aid of Interpretation" set forth in § 202] are applicable to all manifestations of intention and all transactions . . . . They do not depend upon any determination that there is an ambiguity, but are used in determining what meanings are reasonably possible as well as in choosing among possible meanings.").

[21] *See* KNAPP, CRYSTAL & PRINCE, *supra* note 11, at 421-22.

[22] *See, e.g.*, J & B Steel Contractors, Inc. v. C. Iber & Sons, Inc., 642 N.E.2d 1215, 1218 (Ill. 1994); Jake C. Byers, Inc. v. J.B.C. Invs., 834 S.W.2d 806, 814 (Mo. Ct. App. 1992); Trinova Corp. v. Pilkington Bros., P.L.C., 638 N.E.2d 572, 576 (Ohio 1994); American State Bank v. Adkins, 458 N.W.2d 807, 809-10 (S.D. 1990); Pulaski Nat'l Bank v. Harrell, 123 S.E.2d 382, 387 (Va. 1962); Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1148-59 (1995). *See generally* Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533 (1998) (discussing both "contextual" and "objectivist" views and identifying numerous cases of each view illustrative).

[23] *See, e.g.*, Heritage Cablevision v. New Albany Elec. Power Sys., 646 So. 2d

In the oft-cited case of *Pursue Energy Corp. v. Perkins*,[24] the Mississippi Supreme Court prescribed the following "three-tiered process" for construing and interpreting written

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1305, 1312-13 (Miss. 1994); Gilich v. Mississippi State Hwy. Comm'n, 574 So. 2d 8, 11 (Miss. 1990); Malone v. Malone, 379 So. 2d 926, 929 (Miss. 1980); Seal v. Seal, 312 So. 2d 19, 21 (Miss. 1975); Gaston v. Mitchell, 4 So. 2d 892, 893 (Miss. 1941); Harris v. Townsend, 58 So. 529, 529 (1912); Independent Healthcare Mgmt., Inc. v. City of Bruce, No. 96-CA-00989-COA, 1998 WL 881795, at *3 (Miss. Ct. App. Dec. 18, 1998); *see also* IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 104, 110 (Miss. 1998) ("Whenever . . . the intent and object of the contracts cannot be ascertained from the language employed . . . parol evidence may be introduced to show what was in the minds of the parties at the time of making the contract.") (quotation omitted); Cherry v. Anthony, Gibbs, Sage, 501 So. 2d 416, 419 (Miss. 1987) ("Parol evidence as to surrounding circumstances and intent may be brought in where the contract is ambiguous, but where, as here, the contract was found to be unambiguous, it has no place. The parties are bound by the language of the instrument.").

But see, e.g., Fortune Furniture Mfg., Inc. v. Pate's Elec. Co., 356 So. 2d 1176, 1178 (Miss. 1978) ("[W]hether a written contract was intended to be the final and complete expression of the agreement must be determined from the circumstances of the case."); Mississippi Rice Growers Ass'n (A.A.L.) v. Pigott, 191 So. 2d 399, 403 (Miss. 1966) ("In determining whether a contract exists, it is incumbent on the court to try to arrive at the intention of the parties, which must be determined in light of the existing circumstances."); Bivens v. Mobley, 724 So. 2d 458, 462-63 (Miss. Ct. App. 1998) ("Facts regarding intent are to be determined from the circumstances surrounding the transaction."); *see also, e.g.*, Griffin v. Tall Timbers Dev., Inc., 681 So. 2d 546, 551 (Miss. 1996) ("In construing covenants imposing restrictions and burdens on use of land, the language used will be read in its ordinary sense, and the restriction and burden will be construed in light of the circumstances surrounding its formulation, with the idea of carrying out its object, purpose and intent . . . ."); Simmons v. Bank of Miss., 593 So. 2d 40, 43 (Miss. 1992) ("We must read these two clauses in the manner that best fits the words of the lease in its entirety, *open to the implicit*, as we absorb the explicit. We seek as well that meaning most coherent in principle with the best justification which may be found for this language, *given the underlying substantive facts*, most important of which are that Landowner put not one penny into the building Bank's predecessor built and that the building may feasibly be removed without undue harm to the remainder." (emphases added)); Williams v. Batson, 187 So. 236, 238 (Miss. 1939) (en banc) ("The standard of interpretation of an integration (written instrument), except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person *acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration* . . . ." (citing 1 RESTATEMENT OF CONTRACTS § 226 (1932)) (emphasis added)).

[24] 558 So. 2d 349 (Miss. 1990).

instruments:

> First, the court will attempt to ascertain intent by examining the language contained within the "four corners" of the instrument in dispute.
>
> Particular words should not control; rather, the entire instrument should be examined.
>
> This so-called "four corners" doctrine calls for construction through application of correct English definition and language usage. In other words, an instrument should be construed in a manner which makes sense to an intelligent layman familiar only with the basics of English language. Of course, exceptions exist (*i.e.*, when a word has a distinctive legal meaning).
>
> When an instrument's substance is determined to be clear or unambiguous, the parties' intent must be effectuated.
>
> In cases in which an instrument is not so clear (*e.g.*, different provisions of the instrument seem inconsistent or contradictory), the court will, if possible, harmonize the provisions in accord with the parties' apparent intent. A cursory examination of the provisions may lead one to conclude that the instrument is irreconcilably repugnant; however, this may not be a valid conclusion. If examination solely of the language within the instrument's four corners does not yield a clear understanding of the parties' intent, the court will generally proceed to another tier in the three-tiered process. This entails discretionary implementation of applicable "canons" of contract construction . . . .
>
> Application of "canons" of construction may provide a court with an objective inference of the parties' intent. But if, at this step in the process, intent remains unascertainable (*i.e.*, the instrument is still considered ambiguous), then the court may resort to a final tier in the three-tiered process of construction. This final tier entails consideration of extrinsic or parol evidence. In other words, consideration of the totality of the circumstances attendant the devising of an instrument may help reveal the parties' intent . . . .[25]

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[25] *Id.* at 352-53 (quotations, citations, and parentheticals omitted); *accord* Peoples Bank & Trust Co. v. Nettleton Fox Hunting & Fishing Ass'n, 672 So. 2d 1235, 1237-38 (Miss. 1996); *see also* Barnett v. Getty Oil Co., 266 So. 2d 581, 586

"Four corners" analysis does not require a court to literally construe an instrument; rather, it limits the quantum of evidence a court may consider in making its threshold determinations whether or not the "instrument's substance" is clear and unambiguous.[26] As a consequence, the Mississippi Supreme

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(Miss. 1972) ("Where the intentions of the parties to an instrument appear clear and unambiguous from the instrument itself, the court should look solely to the instrument and give same effect as written. If, however, a careful reading of the instrument reveals it to be less than clear, definite, explicit, harmonious in all its provisions, and free from ambiguity throughout, the court is obligated to pursue the intent of the parties, and, to determine the intent, must resort to extrinsic aid."); American Oil Co. v. Estate of Wigley, 169 So. 2d 454, 458 (Miss. 1964) ("[T]he intention of the contracting parties . . . must be determined . . . from the instrument itself in which it is clearly expressed, or from the instrument and the surrounding circumstances. . . .").

The *Pursue Energy* court preceded its analysis with the proviso: "Of course, the so-called three-tiered process is not recognized as a rigid "step-by-step" process. Indeed, overlapping of steps is not inconceivable." *Pursue Energy*, 558 So. 2d at 351 n.6.

More than half a century earlier, in *Sumter Lumber Co. v. Skipper*, 184 So. 296 (Miss. 1938), the Mississippi Supreme Court explained the process this way:

> The rules for the construction of deeds or contracts are designed to ascertain and follow the actual or probable intention of the parties, and are: When the language of the deed or contract is clear, definite, explicit, harmonious in all its provisions, and free from ambiguity throughout, the court looks solely to the language used in the instrument itself, and will give effect to each and all its parts as written. When, however, the language falls short of the qualities above mentioned and resort must be had to extrinsic aid, the court will look to the subject matter embraced therein, to the particular situation of the parties who made the instrument, and to the general situation touching the subject matter, that is to say, to all the conditions surrounding the parties at the time of the execution in respect to all such said surrounding conditions, giving weight also to the future developments thereinabout which were reasonably to be anticipated or expected by them; and when the parties have for some time proceeded with or under the deed or contract, a large measure, and sometimes a controlling measure, of regard will be given to the practical construction which the parties themselves have given it, this on the common sense proposition that actions generally speak even louder than words.

Id. at 298-99, *quoted with approval in* Brashier v. Toney, 514 So. 2d 329, 332 (Miss. 1987).

[26] *See, e.g.*, Ham v. Cerniglia, 18 So. 577, 578 (Miss. 1895) ("If strict regard be had to the literal terms of the written contract, it would appear to be a lease;

Court frequently appears to "cheat" by referring to one or more of the following primary rules of construction while conducting its "four corners" analysis. Strictly speaking, however, only a resort to the circumstances surrounding the formation of the contract[27] or the "practical construction" afforded to the agreement by the parties at and after the time of formation[28] necessarily requires looking beyond the "four corners."

A. Key Concept: Ambiguity

> *To say this paragraph is free from doubt ignores the fact that intelligent lawyers reading it have come to opposite views . . . . In the absence of the two parties who signed it informing us precisely what was meant, the most enlightened argument from here to the millennium would never remove the cloud cast by the words.*[29]

An instrument is ambiguous if one or more terms or provisions are susceptible to more than one reasonable meaning.[30] Mere disagreement between the parties about the meaning of a provision of a contract is not enough to make the contract ambiguous.[31]

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but looking below the surface, and through the mere form employed, we have no hesitation in declaring the contract one of conditional sale. The total value of the property is named in the face of the instrument, and the 'monthly rentals,' as they are called; but these monthly installments, if paid promptly, would quickly equal the value of the property.").

[27] *See infra* subpart II.C.7.

[28] *See infra* subpart II.C.8.

[29] Frazier v. Northeast Miss. Shopping Ctr., Inc., 458 So. 2d 1051, 1054 (Miss. 1984).

[30] *See* Universal Underwriters Ins. Co. v. Buddy Jones Ford, Lincoln-Mercury, Inc., 734 So. 2d 173, 176 (Miss. 1999); IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 110 (Miss. 1998); J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co., 723 So. 2d 550, 552 (Miss. 1998); Insurance Co. of N. Am. v. Deposit Guar. Nat'l Bank, 258 So. 2d 798, 800 (Miss. 1972). *See generally* HUNTER, *supra* note 5, § 7.13, at 7-20. Ambiguity does not void an agreement if other evidence can sufficiently and reliably explain the ambiguous term or provision. Freeman v. Greenville Convalescent Home, Inc., No. 96-CA-00466-COA, 1998 WL 881772, at *5 (Miss. Ct. App. Dec. 18, 1998).

[31] Cherry v. Anthony, Gibbs, Sage, 501 So. 2d 416, 419 (Miss. 1987); *accord*

If a contract is clear and unambiguous, its meaning and effect are matters of law which may be determined by the court, and which should be enforced as written.[32]

1. "Patent" vs. "Latent" Ambiguity

Ambiguity may be *patent*—appearing "on the face of the contract"[33]—or *latent*—"aris[ing] from words which are uncertain when applied to the subject matter of the contract."[34]

In *Traders' Insurance Co. of Chicago v. E.D. Edwards Post No. 22, G.A.R.*,[35] the defendant insurer undertook to insure the plaintiff's hall and its contents "for the term of three years from the fourteenth day of January, 1903, at noon, to the fourteenth day of January, 1904, at noon."[36] Finding these two statements of duration—"for the term of three years" and "from the fourteenth day of January, 1903, at noon, to the fourteenth day of January, 1904, at noon"—each to be "perfectly clear in

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Burton v. Choctaw County, 730 So. 2d 1, 6 (Miss. 1997); *IP Timberlands*, 726 So. 2d at 104; Whittington v. Whittington, 608 So. 2d 1274, 1278 (Miss. 1992); Hynson v. Jeffries, 697 So. 2d 792, 795 (Miss. Ct. App. 1997).

[32] *See Buddy Jones Ford*, 734 So. 2d at 176; *IP Timberlands*, 726 So. 2d at 106; Shaw v. Burchfield, 481 So. 2d 247, 252 (Miss. 1985); Smith v. First Fed. Sav. & Loan Ass'n of Grenada, 460 So. 2d 786, 790 (Miss. 1984); Dennis v. Searle, 457 So. 2d 941, 945 (Miss. 1984); Pfisterer v. Noble, 320 So. 2d 383, 384 (Miss. 1975).

[33] *See Burton*, 730 So. 2d at 8; Ham v. Cerniglia, 18 So. 577, 578 (Miss. 1895); *see also* Lamb Constr. Co. v. Town of Renova, 573 So. 2d 1378, 1380-83 (Miss. 1990) (holding contract patently ambiguous where "unit" price of $5.50 per foot times total number of feet—5,530—did not equal total price indicated for all 5,530 feet, which was indicated as "$18,725.00," rather than mathematically correct "$29,425.00"); Carlisle v. Estate of Carlisle, 252 So. 2d 894, 895-96 (Miss. 1971) (holding that testamentary grant of "one-half value of home" was patently ambiguous because it is unclear whether testatrix meant "the home" to mean house only, house and some of property on which it sits, house and all of property on which it sits, etc., and "courts have generally held term 'home' has much broader meaning than 'house'").

[34] *IP Timberlands*, 726 So. 2d at 104, 110; *see, e.g.*, Tinnin v. First United Bank of Miss., 570 So. 2d 1193, 1195 (Miss. 1990); *Dennis*, 457 So. 2d at 947; James v. Board of Supervisors of Wilkinson County, 117 So. 111, 113 (Miss. 1928); Miles v. Miles, 30 So. 2, 3 (Miss. 1901).

[35] 38 So. 779 (Miss. 1905).

[36] *Id.* at 779.

itself, but . . . mutually inconsistent and contradictory,"[37] the court found the policy to be ambiguous—or, in its words, "a palpable case of equivocation in description, induced, doubtless, by clerical misprision."[38]

Patent ambiguity was also the focus of the court's analysis in *Schlottman v. Hoffman*,[39] where a codicil to the testatrix's will granted to each of her two sons "$5 00," which the court recognized could be read as either "$5.00" or "$500."[40] The court described the ambiguity as follows:

> When different sums may be expressed by the use of the same characters or figures, according to their collection, and, as arranged, an uncertainty as to their meaning is suggested, an ambiguity appears upon the face of the instrument; and such, we think, is disclosed by the codicil in this case. We cannot say whether the sum given to the legatees is $5, or $500. There is an absence of the decimal mark, but the ciphers are linked together, removed by an unusual space from the figures they qualify, and written, not on the line, but somewhat above it.[41]

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[37] *Id.*

[38] *Id.*

[39] 18 So. 893 (Miss. 1895).

[40] *See id.* at 895-96.

[41] *Id.* at 896.

What, then, to do?

> [I]f, as we have said, there exists an ambiguity on the face of the codicil, then, unless parol evidence may be received, the codicil is inoperative . . ., because the court would not know what sum to decree to be paid.

Id. Having previously recited testimony regarding discussions the testatrix had with her neighbor and her lawyer at the time the will was executed, the court resolved the ambiguity based on the evidence of those surrounding circumstances:

> Looking, in the case before us, to the situation of the testatrix, the condition of her family, the character and quantity of her estate, and the res gestae of the execution of the will, *we see clearly what she meant and intended to do*, and no violence is done to the words she has employed, nor is anything added thereto, by accepting the figures of the codicil as meaning $5, instead of $500. They may mean, indifferently, the one or the other.

Id. (emphasis added).

The role of surrounding circumstances in construing and interpreting contracts

In *Miles v. Miles*,[42] the issue was not patent ambiguity, but rather ambiguity that arose when the court tried to apply the terms of the document to its subject matter (*i.e.*, "latent" ambiguity). In *Miles*, Theus N. Miles, one of two sons of General William R. Miles, sought to purchase his brother Edward H. Miles's interest in their father's estate. After several letters and conversations,

> Ed. and Theus and their father met at Goodhope on July 1, 1897, and the following acts were done: Ed. executed a conveyance of "my entire interest in the estate of W.R. Miles, my father, to Theus N. Miles and Alice Merrick Miles, for and during their lives, with remainder over to the issue of their bodies. This contract embraces anything and everything that I would inherit at my father's death, be the same real estate, personal property, or ornaments, payment to be made by Theus N. Miles" . . . . On the same day, the father executed a conveyance to Theus N. Miles and wife for life, remainder to their issue, of two plantations known, respectively, as "Quofaloma" and "Omega," beginning the conveyance with these words: "Whereas, my son E.H. Miles has sold his interest in my estate to his brother, Theus N. Miles." . . . [O]n that same day the father wrote his will, though it was not finally executed until six days thereafter. This will provides that: "Whereas, my son Edward H. Miles sold his entire interest in my estate to his brother, Theus N. Miles; and whereas, on the first day of July, 1897, I made a deed to said Theus N. Miles of the Omega and Quofaloma plantations, which, in connection with advances theretofore made, constituted his and his brother Edward's full share of my estate,"—therefore he proceeds to devise his remaining two plantations, Goodhope and Black Bayou, to his wife.[43]

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is discussed further in subpart II.B.7, *infra*. More generally, the role of extrinsic evidence—including, but not limited to extrinsic evidence of the circumstances surrounding the formation of the contract—in construing and interpreting ambiguous contracts is discussed further in Part III, *infra*.

[42] 30 So. 2 (Miss. 1901).

[43] *Id.* at 2-3.

The court explained the consequences of these acts as follows:

> Ed. Miles conveyed to Theus his "entire interest in the estate of W. R. Miles," his father. If his father had been dead, there would have been no ambiguity whatever of any sort. But we learn aliunde the deed that his father was then living, and Ed. therefore had no interest in his estate. This creates a latent ambiguity, an intermediate one, and raises the question, what is meant by the terms "entire interest in the estate of W. R. Miles?"[44]

The issue on appeal was whether Ed had a lien against Omega to secure Theus's promise to pay $10,000 for Ed's "entire interest" in their father's estate. The court said "Yes":

> The bill shows what they meant and understood to be conveyed by these terms, which are not in themselves ambiguous, but are made so by the development of the fact that Gen. Miles was then alive. The deed related to property as conveyed, and expressly reserved a lien on it for $10,000. It appears from the bill that Omega was the subject of the conveyance, and the property understood by the parties as the interest of Ed. in the estate of his father, and Ed also renounced claim to everything else of the estate. The express lien is clearly enforceable against Omega.[45]

2. *Who Decides Whether an Instrument Is Ambiguous?*

Whether a written agreement is ambiguous is a question of law for the court.[46] Because the *existence* of ambiguity is a conclusion of law, the appellate courts will review a trial court's determination *de novo*.[47]

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[44] *Id.* at 3.

[45] *Id.* (citations omitted).

[46] *See* Clark v. State Farm Mut. Auto. Ins. Co., 725 So. 2d 779, 781 (Miss. 1998); Lamb Constr. Co. v. Town of Renova, 573 So. 2d 1378, 1383 (Miss. 1990); Whittington v. Whittington, 608 So. 2d 1274, 1278 (Miss. 1992).

Unlike integration, which may exist in degrees, *see infra* subpart II.B.1, a contract is either ambiguous or it is not. A finding of "partial ambiguity" is, therefore, not an acceptable result of the trial court's initial determination. *Cf.* Lehman-Roberts Co. v. State Hwy. Comm'n, 673 So. 2d 742, 744 (Miss. 1996) (calling trial court's findings and conclusions—including but not limited to trial court's statement that subject clause was "somewhat ambiguous"—"a bit confusing").

In *Estate of Parker v. Dorchak*,[48] the decedent (Parker) sold his step-son (Dorchak) an option to purchase a residence known as "Windy Acres." Dorchak was to pay $10,000 cash and $20,000 over time for the option to purchase Windy Acres for a total of $225,000, inclusive of the option payments.[49] More than a year later, Dorchak exercised the option to buy Windy Acres, executing a promissory note for $215,000—the $225,000 purchase price, less the $10,000 already paid for the option—secured by a deed of trust on the property. The promissory note obligated Dorchak to pay interest on the $215,000 indebtedness "from date."[50] The meaning of this phrase was the central issue at trial and on appeal. Parker's executrix argued that "from date" meant that interest began accruing on the date of the promissory note, whereas the Dorchaks argued that, because the note did not require them to make monthly installment payments until they occupied the premises, that "from date" meant interest would accrue beginning when they took occupancy.[51] Ultimately, the chancellor agreed with the Dorchaks, and Parker's executrix appealed. The Mississippi Supreme Court addressed the standard of review issue as follows:

> In his Supplemental Opinion and Ruling, the Chancellor made brief note of this provision in the note, but he then looked to extrinsic evidence as to the parties' intent, most notably with regard to an option contract which was drafted over one year prior to the date of the note. The Chancellor was without discretion to so consider extrinsic evidence, unless he first found that the promissory note was ambiguous under the Parol Evidence Rule. The Chancellor's ruling makes no mention of a finding of ambiguity in the note prior

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[47] *See* IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 104, 108 (Miss. 1998); *Whittington*, 608 So. 2d at 1278.

[48] 673 So. 2d 1379 (Miss. 1996).

[49] *Id.* at 1380.

[50] *Id.*

[51] *Id.*

> to looking at extrinsic evidence, and as such, although well-reasoned, does not employ the proper legal analysis. Accordingly, it is for this Court to conduct a de novo review of the facts, taking into consideration the applicable considerations under the Parol Evidence Rule.[52]

3. *Who Decides What the Ambiguous Terms Mean?*

On the other hand, a writing is ambiguous, the trier of fact must determine the meaning of its terms or provisions.[53]

In *Deer Creek Construction Co. v. Peterson*,[54] the deed of trust and note executed by Mrs. Peterson to Deer Creek provided, in relevant part: "Note payable ninety days from date, with interest after maturity at 9% per annum until fully paid."[55] The court explained that

> Mrs. Peterson was allowed to testify, over the objections of Brown and Deer Creek . . ., that Mr. Brown told her the house would be finished within ninety days and that no interest would be due on the note until such time as the house was

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[52] *Id.* at 1381. Ultimately, the court affirmed the trial court's judgment for the Dorchaks:

> After conducting said *de novo* review, and considering the competing canons of contract construction, it is apparent that the judgment reached by the trial judge was correct, although his legal analysis may have been incomplete. The language of the promissory note is in fact ambiguous, and a consideration of the extrinsic evidence, as well as of the note itself, leads inescapably to the conclusion that the "from date" language, which forms the basis of this entire appeal, should not be interpreted in the manner which the Executrix asserts.

Id. at 1382. The so-called "canons of construction" alluded to by the *Dorchak* court will be addressed at length later in this article, *see infra* subparts II.C-.E, as will the parol evidence rule, *see infra* Part III. For present purposes, this case supports the rule that an appellate court's review of a trial court's finding of ambiguity is *de novo*.

[53] *See* Clark v. State Farm Mut. Auto. Ins. Co., 725 So. 2d 779, 781 (Miss. 1998); Lamb Constr. Co. v. Town of Renova, 573 So. 2d 1378, 1383 (Miss. 1990); Dennis v. Searle, 457 So. 2d 941, 945 (Miss. 1984). *See generally* Barnett v. Getty Oil Co., 266 So. 2d 581, 586 (Miss. 1972) ("If, however, a careful reading of the instrument reveals it to be less than clear, definite, explicit, harmonious in all its provisions, . . . the court is obligated to pursue the intent of the parties.").

[54] 412 So. 2d 1169 (Miss. 1982).

[55] *Id.* at 1172.

> finished . . . .
>
> The construction proposal of Brown, accepted by Mrs. Peterson, dealing with the specifications and price contains no provision with reference to time of completion. However, a note and deed of trust executed by Mrs. Peterson for the purpose of securing Deer Creek and Brown for the construction price provided "Note payable ninety days from date, with interest after maturity at 9% per annum until fully paid." These three instruments represent all of the written agreement with respect to the construction of this house.[56]

The court noted that, "[w]hen a contract for the construction of a house contains no specific time in which the construction is to be completed, the general rule is that a reasonable period of time for construction is inferred. However, where the contract is ambiguous or indefinite as to the construction period, then parol evidence is admissible for clarification."[57] The court continued:

> [T]he proposal for building the home submitted by Deer Creek and Brown to Mrs. Peterson and accepted by her must be read together with the note and deed of trust which she executed to Deer Creek and Brown for the purpose of securing the construction price in order to determine the intent of the parties. When this is done, a clear ambiguity appears as to the length of time for construction because the proposal submitted by Deer Creek and Brown to Mrs. Peterson was silent as to when the construction would be completed. Yet, the note and deed of trust given to secure Deer Creek and Brown during the construction period clearly states that it was due and payable in ninety days . . . . Therefore, it was not error for the trial court to allow . . . Mrs. Peterson's testimony, that Brown told her that the house would be completed within ninety days, in order to shed light on the ambiguity. Brown testified that he did not make such a representation. The jury was properly allowed to resolve the question.[58]

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[56] *Id.*

[57] *Id.* (citations omitted).

[58] *Id.* (citation omitted).

Because the *resolution* of ambiguity, once the trial court has found it to exist, is a question of fact, the appellate court must respect the trial court's finding as long as it is supported by credible evidence and is not manifestly wrong.[59]

4. *How Does the Issue Arise?*

Any court asked to enforce a contract must first determine what the contract says, and

> if the language of the contract is plain and unambiguous, the [court] must enforce it as written. However, if it is less than clear, the court must then attempt to ascertain the intent of the parties. As a [court] must determine how clear a contract is before he can determine its meaning, whether a party raises a claim of ambiguity or not is in a very real sense irrelevant.[60]

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[59] *See* Lamb Constr. Co. v. Town of Renova, 573 So. 2d 1378, 1383 (Miss. 1990); *see also* Kight v. Sheppard Bldg. Supply, Inc., 537 So. 2d 1355, 1358 (Miss. 1989) ("[T]he interpretation of an ambiguous writing by resort to extrinsic evidence presents a question of fact."). If the issue is decided by a jury, then the appellate court should respect the jury's verdict unless it is "against the overwhelming weight of the evidence." Adams v. Green, 474 So. 2d 577, 581 (Miss. 1985).

[60] Century 21 Deep South Properties, Ltd. v. Keys, 652 So. 2d 707, 717 (Miss. 1995).

The *Century 21* court went on to contrast ambiguity from contract defenses: "This is what sets ambiguity apart from the affirmative defenses. The clarity of a contract must always be considered before a contract may be enforced, whereas the consideration of non-plead affirmative defenses is not required." *Id.* The court then quoted from *Hertz Commercial Leasing v. Morrison*, 567 So. 2d 832, 835 (Miss. 1990):

> As defenses to a contract action, failure of consideration, illegality and statute of frauds are similar. Each assumes the contract on its face entitles plaintiff to prevail but then reaches into the bag of rules prescribing forms and limiting the power of persons to contract and pulls one out, saying, "See, this contract may not be enforced." Each finds a rule of law external to the contract and brings it to bear to bar the plaintiff's action.

Century 21, 652 So. 2d at 717. The *Century 21* court concluded:

> Ambiguity, however, is not a rule of law external to the contract. It is if anything internal, concerned with what the contract means and not

5. The Consequences of Ambiguity

If the trial court, in the course of conducting its "four corners" analysis,[61] finds that the written instrument is other than "clear and unambiguous," *Pursue Energy Corp. v. Perkins*[62] instructs the trial court to discretionarily apply any relevant "canons" of construction.[63] These canons (or "rules" or "maxims") are the subjects of subparts II.C and II.D, *infra*.[64]

In the course of applying one or more canons of construction, the trial court may have to resort to extrinsic evidence.[65] And, in any event, if applying the canons does not resolve the ambiguity as a matter of law, the court will consider extrinsic evidence.[66] Part III of this article more fully examines the per-

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> with whether the contract should be enforced. Clearly, one cannot determine the enforceability of a contract until one first determines its meaning. Ambiguity analysis, unlike affirmative defense analysis, is by its very nature a necessary step in the examination of every contract. *Ambiguity therefore does not need to be affirmatively pled by either party.* Ambiguity analysis of the contract was not error.

Id. (emphasis added).

[61] *See supra* text accompanying notes 23-28.

[62] 558 So. 2d 349 (Miss. 1990).

[63] *Pursue Energy Corp.*, 558 So. 2d at 352 ("If examination solely of the language within the instrument's four corners does not yield a clear understanding of the parties' intent, the court will generally proceed to another tier in the three-tiered process. This entails discretionary implementation of applicable 'canons' of contract construction."). *See supra* text accompanying note 25.

[64] Additionally, subpart II.E, *infra*, discusses rules of construction and interpretation that the Mississippi Supreme Court has applied to particular types of instruments. The rules discussed in subpart II.E are, generally speaking, subordinate to the "primary" rules of construction and interpretation discussed in subpart II.C, and either subordinate to or on a par with the "secondary" rules of construction and interpretation discussed in subpart II.D.

[65] For example, extrinsic evidence would be required to apply either the "surrounding circumstances" rule, *see infra* subpart II.C.7, or the "practical construction" rule, *see infra* subpart II.C.8, and would also be required to apply the presumption against illegality, *see infra* subpart II.C.5, at least to the extent necessary to get the trial court to take judicial notice of the applicable law or public policy which is threatened by a particular construction or interpretation of the instrument's terms.

[66] *See Pursue Energy Corp.*, 558 So. 2d at 353 ("[I]f, [after applying the relevant canons of construction], intent remains unascertainable (*i.e.*, the instrument is still considered ambiguous), then the court may resort to a final tier in the

missible uses of extrinsic evidence in construing and interpreting a written instrument that is latently[67] or patently[68] ambiguous.

B. Key Concept: Integration

> *The parties to an agreement often reduce all or part of it to writing. Their purpose in so doing is commonly to provide reliable evidence of its making and its terms and to avoid trusting to uncertain memory . . . . In the interest of certainty and security of transactions, the law gives special effect to a writing adopted as a final expression of an agreement.*[69]

If the parties to a written contract intend it to serve as a final expression of their agreement as to the terms contained in the writing, then the contract is said to be *integrated.*[70] All prior negotiations and agreements regarding the subject matter of an integrated term or agreement are "merged" into that integrated term or agreement.[71]

For example, in *Gilchrist Tractor Co. v. Stribling*,[72]

> the parties first entered into a preliminary written agreement which provided, among other things, that further written agreements would be made later, dealing more specifically with each of the several aspects of the transaction. This was done, and these contracts, prepared later in the light of the

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three-tiered process of construction. This final tier entails consideration of extrinsic or parol evidence.").

[67] *See supra* notes 34, 42-45 and accompanying text.

[68] *See supra* notes 33, 35-41 and accompanying text.

[69] RESTATEMENT (SECOND) OF CONTRACTS ch. 9, topic 3 intro. note, at 114 (1981).

[70] *See id.* § 209(1); FARNSWORTH, *supra* note 3, § 7.3, at 215.

[71] *See* Houser v. Brent Towing Co., 610 So. 2d 363, 365 (Miss. 1992); Singing River Mall Co. v. Mark Fields, Inc., 599 So. 2d 938, 946 (Miss. 1992); Mississippi State Hwy. Comm'n v. Cohn, 217 So. 2d 528, 531 (Miss. 1969); Grenada Auto Co. v. Waldrop, 195 So. 491, 492 (Miss. 1940); State Hwy. Dep't v. Duckworth, 172 So. 148, 150 (Miss. 1937); Red Snapper Sauce Co. v. Bolling, 50 So. 401, 401 (Miss. 1909); Odoneal v. Henry, 12 So. 154, 155 (Miss. 1892).

[72] 192 So. 2d 409 (Miss. 1966).

> developed facts, supplemented the original written agreements and superseded prior oral agreements, if any. They dealt with the same subject matter and the contracting parties were the same . . . . Prior discussions and oral agreements, if any, were merged into and superseded by the final agreements of the parties as reflected by their detailed written contracts.[73]

1. *Full vs. Partial Integration*

An integrated agreement may be either fully integrated or only partially integrated. A *fully integrated* contract is one that is a final and complete expression of all the terms agreed upon between or among the parties.[74] If a contract is fully integrated, all prior and contemporaneous negotiations are merged into the written contract.[75]

In *Keys v. Rehabilitation Centers, Inc.*,[76] the court explained the effect of the fully integrated closing documents on the rights and obligations established in a preliminary indemnity agreement that pre-dated the closing:

> [T]he Keyses argue that their indemnity obligations are governed by the May 13, 1982, purchase agreement and not by the indemnity agreement delivered at closing on July 1, 1982 . . . . The short answer is that their fundamental premise is wrong. The purchase agreement . . . . was not the sale itself. By its terms, it contemplated a closing a little over six weeks later, or whenever the necessary administrative approvals were obtained. At closing the terms of the purchase agreement merged into the closing documents: the deeds, bill

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[73] *Gilchrist Tractor Co.*, 192 So. 2d at 417; *see also, e.g.*, West v. Arrington, 183 So. 2d 824, 827 (Miss. 1966) ("[A]ll negotiations between the Arringtons and West were merged in the deed which the grantee accepted and under which he and his grantees claim.").

[74] *See* Housing Auth., City of Laurel v. Gatlin, 738 So. 2d 249, 251 (Miss. 1998); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 210(1) (1981); FARNSWORTH, CONTRACTS, *supra* note 3, § 7.3, at 215-16.

[75] *See Singing River Mall*, 599 So. 2d at 946; *see also* Continental Gin Co. v. Freeman, 237 F. Supp. 240, 244-45 (N.D. Miss. 1964), *aff'd*, 381 F.2d 459 (5th Cir. 1967).

[76] 574 So. 2d 579 (Miss. 1990).

> of sale, promissory notes, and the indemnity agreement. The closing documents themselves subsumed the comparable provisions of the purchase agreement.[77]

A contract is *partially integrated* if the written agreement is a final and complete expression of some or all of the terms contained therein, but not all of the terms agreed upon between or among the parties are contained in the written agreement.[78] For example, an agreement is only partially integrated "if the writing omits a consistent additional agreed term which is (a) agreed to for separate consideration, or (b) such a term as in the circumstances might naturally be omitted from the writing."[79]

In *Walley v. Bay Petroleum Corp.*,[80] the trial judge excluded extrinsic evidence that tended to show that the appellee had agreed to sell its products on competitive terms. The trial judge assumed that the three writings in question—two notes and a letter of guaranty—"constitute[d] a full integration of the agreement between the parties."[81] The Fifth Circuit disagreed:

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[77] *Keys*, 574 So. 2d at 583.

[78] The Mississippi Supreme Court has explained:

> The written provisions adopted by contracting parties merge only those prior and contemporaneous writings which are contained within as the final and complete expression of their agreement. . . . This does not mean, however, that a separate contract may not be entered into to explain or supplement the existing contract.

Security Mut. Fin. Corp. v. Willis, 439 So. 2d 1278, 1281 (Miss. 1983); *see also* Fortune Furniture Mfg., Inc. v. Pate's Elec. Co., 356 So. 2d 1176, 1178 (Miss. 1978); RESTATEMENT (SECOND) OF CONTRACTS § 210(2) (1981); FARNSWORTH, CONTRACTS, *supra* note 3, § 7.3, at 215.

[79] RESTATEMENT (SECOND) OF CONTRACTS § 216(2). The *Restatement* provides the following illustration:

> *A* and *B* in an integrated writing promise to sell and buy [respectively] a specific automobile. As part of the transaction they orally agree that *B* may keep the automobile in *A*'s garage for one year, paying $15 a month [above and beyond the selling price of the car]. The oral agreement *is not* within the scope of the integration and is not superseded.

Id. § 216 illus. 3, at 138 (emphasis added). The *Restatement* counsels that "[t]his situation is especially likely to arise when the writing is in a standardized form which does not lend itself to the insertion of additional terms," such as negotiable instruments, leases and conveyances, and the like. *Id.* § 216 cmt. d., at 138-39. Also, certain terms collateral to a negotiable instrument would, if included in the terms of the instrument, destroy its negotiability; therefore, it is "natural" to leave such terms off the face of the instrument. *Id.* at 139.

[80] 312 F.2d 540 (5th Cir. 1963).

> [T]he three writings are so incomplete as to show on their face that they were not intended to constitute the full agreement between the parties.
>
> In essence, the evidence offered, and rejected, went to show that, in addition to the recitation of consideration received contained in the notes, there was promissory consideration to the appellant, namely, appellee's promise to sell the products to Walco on competitive terms. . . . [S]ince the writings constituted only a partial integration of the agreement, the appellant could show the existence of additional, promissory consideration for his promise of guaranty.[82]

a. Mississippi Common Law Presumes That a Written Contract Is Fully Integrated

Mississippi courts presume that written agreements are fully integrated.[83] This rebuttable presumption, ancient in origin,[84] and still embraced by Mississippi common law, is at odds with both the Uniform Commercial Code[85] and the *Restatement (Second) of Contracts*[86]—both of which reject the

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[81] *Walley*, 312 F.2d at 544 (applying Mississippi law).

[82] *Id.* at 544-45 (footnote omitted).

[83] *See* Bank of Lena v. Slay, 170 So. 635, 636 (Miss. 1936) ("It is well settled in this state that, when parties deliberately put their agreement in writing, it will be presumed that the whole contract was embodied in such writing . . . ."); *see also, e.g.*, Hoerner v. First Nat'l Bank of Jackson, 254 So. 2d 754, 759 (Miss. 1971); Parker v. McCaskey Register Co., 171 So. 337, 339-40 (Miss. 1936); Red Snapper Sauce Co. v. Bolling, 50 So. 401, 401 (Miss. 1909); Houck v. Wright, 23 So. 422, 422 (Miss. 1898). *But see* Fortune Furniture Mfg., Inc. v. Pate's Elec. Co., 356 So. 2d 1176, 1178 (Miss. 1978) ("[W]hether a written contract was intended to be the final and complete expression of the agreement must be determined from the circumstances of the case.").

[84] *See, e.g.*, Kerr v. Calvit, 1 Miss. (Walker) 115, 118 (1822) ("[I]t cannot be a safe or salutary rule, to allow a contract to rest partly in writing, and partly in parol. Whenever it is reduced to writing, that is to be considered the evidence of the agreement, and every thing resting in parol, becomes thereby extinguished.") (citing Jackson v. Bradt, 2 Cai. R. 169 (N.Y. 1804)). *See generally* 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2426, at 81-93 (James H. Chadbourn rev. ed. 1972) (tracing the origins of the parol evidence rule, including but not limited to the doctrine of merger and the presumption that written agreements are integrated, and concluding that the modern version of rule and its basic trappings came into being by end of 1600s).

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[85] *See* UNIFORM COMMERCIAL CODE § 2-202 cmt. 1 (1995) ("This section definitely rejects . . . [a]ny assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon.").

While the Mississippi legislature has adopted section 2-202 of the Uniform Commercial Code, *see* MISS. CODE ANN. § 75-2-202 (1981), it has not adopted the official comments—including, but not limited to, the comment quoted above, *see* MISS. CODE ANN. § 75-1-101 *et seq.* (1981 & Supp. 1998). Nonetheless, a number of Mississippi cases have turned to the official comments for guidance on matters governed by Article 2. *See, e.g.*, Patel v. Telerent Leasing Corp., 574 So. 2d 3, 7 (Miss. 1990); Beck Enter., Inc. v. Hester, 512 So. 2d 672, 676 (Miss. 1987); Rester v. Morrow, 491 So. 2d 204, 211 (Miss. 1986); Franklin County Coop. v. MFC Servs. (A.A.L.), 441 So. 2d 1376, 1378 (Miss. 1983); Bell v. Hill Bros. Constr. Co., 419 So. 2d 575, 577 (Miss. 1982); Derden v. Morris, 247 So. 2d 838, 839 (Miss. 1971); *see also, e.g.*, Mid-South Packers, Inc. v. Shoney's, Inc., 761 F.2d 1117, 1123 (5th Cir. 1985); Louis Dreyfus Corp. v. Brown, 709 F.2d 898, 900 (5th Cir. 1983); Weathersby v. Gore, 556 F.2d 1247, 1256-57 (5th Cir. 1977); Curry v. Sile Distrib., 727 F. Supp. 1052, 1054 (N.D. Miss. 1990); C.R. Daniels, Inc. v. Yazoo Mfg. Co., 641 F. Supp. 205, 209-10 (S.D. Miss. 1986).

Even if Mississippi courts were to construe section 75-2-202 consistently with official comment 1, parties would be able to vary the provisions of the UCC by explicit agreement. *See* MISS. CODE ANN. § 75-1-102(3) (1981). Therefore, parties to a written agreement subject to the UCC could easily include language in the operative provision(s) that has the effect of creating a presumption of full integration, as well as precluding the resort to extrinsic evidence of the types that the UCC otherwise makes admissible. *See infra* subpart III.D.

[86] *See* RESTATEMENT (SECOND) OF CONTRACTS § 210 cmt. a, at 118 (1981) (counseling that § 210(1) "is to be read with the definition of integrated agreement in § 209, to reject the assumption sometimes made that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon"); *id.* § 209 illus. 3, at 116-17 ("In the absence of contrary evidence, the writing is taken to be an integration; whether it is a complete integration is decided on the basis of all relevant evidence."); *see also* Braucher, *supra* note 3, at 16 & n.23.

According to the *Restatement*, a party may prove complete or partial integration on the basis of "any relevant evidence." RESTATEMENT (SECOND) OF CONTRACTS § 210 cmt. b, at 118. While a written, facially integrated, and unambiguous contract signed by both parties *may* be decisive of the extent of integration, "a writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties." *Id.* The *Restatement* offers the following illustration:

> *A*, a college, owns premises which have no toilet or plumbing facilities or heating equipment. In negotiating a lease to *B* for use of the premises as a radio station, *A* orally agrees to permit the use of [toilet and

presumption that, simply because a writing is integrated as to some terms, it is fully integrated as to all terms.

The rationale for presuming full integration is fairly straightforward: Once the parties have reduced their agreement to writing they are presumed to have selected from prior negotiations only the promises and agreements for which they choose to be bound.

b. The Significance of "Merger" or "Integration" Clauses

To manifest their intention to create a completely integrated agreement, parties will often include a "merger" or "integration" clause[87] stating something to the effect that the writing contains or constitutes "the entire agreement between the parties and supersedes any and all prior agreements, arrangements, or understandings between the parties relating to the subject matter," and that there are no "oral understandings, statements, promises or inducements contrary to the terms of" the writing.[88] The effect of including such a clause,

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> plumbing] facilities in an adjacent building and to provide heat. The parties subsequently execute a written lease agreement which makes no mention of [the use of the adjacent] facilities or heat. *The question whether the written lease was adopted as a completely integrated agreement is to be decided on the basis of all relevant evidence of the prior and contemporaneous conduct and language of the parties.*

Id. § 210 illus. 1, at 118 (emphasis added).

[87] Merger and integration clauses serve essentially the same purpose, have essentially the same effect, and are often used and referred to interchangeably. The difference between them is that an *integration clause* recites that the written contract constitutes the sole and complete agreement between or among the parties, while a *merger clause* recites that the written contract supersedes all prior oral or written agreements, leaving the written contract the sole remaining, and therefore complete, agreement between or among the parties. *See* Glasser & Rowley, *supra* note 10, at 711 n.254. Thus, a merger clause presupposes prior oral and/or written agreements, whereas an integration clause does not.

[88] Holland v. Mayfield, No. 96-CA-01169-SCT, 1999 WL 353023, at *3 (Miss. June 3, 1999); *see, e.g.*, Franklin v. Lovitt Equip. Co., 420 So. 2d 1370, 1371 (Miss. 1982); Casualty Reciprocal Exch. v. Wooley, 217 So. 2d 632, 637 (Miss. 1969); Housing Auth., City of Laurel v. Gatlin, 738 So. 2d 249, 250 (Miss. Ct. App. 1998); *see also* FARNSWORTH, *supra* note 3, § 7.3, at 223-25; MURRAY, *supra* note 10, § 84, at 386; Estes & Love, *supra* note 10, at 11-12.

as a general rule, is to make evidence of prior or contemporaneous oral agreements and representations "varying, modifying, or controlling the written agreement . . . inadmissible."[89]

However, the mere fact that a written contract contains a merger or integration provision does not guarantee full integration.[90] For example, in *Swinny v. Cities Service Oil Co.*,[91] the written contract contained the following provision: "In the event of the sale of products in tank car lots to customers in the territory covered by this agreement, the Corporation shall pay to the Distributor such commission *as shall be agreed upon*."[92] Cities Service Oil Co. did, in fact, sell products in tank car lots to customers in the territory covered by its agreement with Swinny (the "Distributor"), but did not pay Swinny any commission because Swinny did not negotiate the deal.[93] In the ensuing lawsuit, Swinny offered testimony that Cities had orally agreed to pay him one-eighth of one cent per gallon sold.[94] The trial court found for Cities, and Swinny appealed.

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[89] Stribling Bros. Mach. Co. v. Girod Co., 124 So. 2d 289, 293 (Miss. 1960); *accord* Berry v. McKay, 194 So. 299, 300 (Miss. 1940); *see, e.g.*, Grenada Auto. Co. v. Waldrop, 195 So. 491, 492 (Miss. 1940) (finding merger in a contract that stated "[t]his contract constitutes the entire agreement; no waivers or modifications shall be valid unless written upon or attached hereto," and "all promises, verbal understandings, or agreements of any kind pertaining to this purchase not specified herein are hereby expressly waived."); *Gatlin*, 735 So. 2d at 250-51; *see also* Phillips v. Chevron U.S.A., Inc., 792 F.2d 521, 526 (5th Cir. 1986); General Plumbing & Heating, Inc. v. American Air Filter Co., 696 F.2d 375, 378 (5th Cir. 1983) (both applying Mississippi law).

[90] *See, e.g.*, Lambert v. Mississippi Limestone Corp., 405 So. 2d 131, 132-33 (Miss. 1981) (approving resort to extrinsic evidence, despite the presence of merger clause, where two paragraphs of written agreement appeared to be in conflict with one another); Dunavant Enter., Inc. v. Ford, 294 So. 2d 788, 789-91 (Miss. 1974) (approving resort to extrinsic evidence, despite the presence of merger clause, where writing "called for cotton to be produced on 1,600 acres situated in Marks, Mississippi," despite the fact that there were not, in fact, 1,600 acres in Marks, Mississippi on which cotton could be grown). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 216 cmt. e, at 140 ("Written agreements often contain clauses stating that there are no representations, promises or agreements between the parties except those found in the writing . . . . But such a clause does not control the question whether the writing was assented to as an integrated agreement . . . .").

[91] 197 So. 2d 795 (Miss. 1967).

[92] *Swinny*, 197 So. 2d at 796 (emphasis added).

[93] *Id.* at 797.

The Mississippi Supreme Court rejected Cities' argument that the oral agreement regarding Swinny's commission was incompetent because the written contract contained a written merger and no-oral-modification clause:

> [Cities] contends that the "alleged oral agreement" is unenforceable as to the commission because the contract contains a paragraph in which it is said: "This agreement constitutes the entire agreement between the parties, and may not be changed except by written agreement signed by an executive officer of [Cities]."
>
> We do not agree with the argument that this suit is an effort to change the contract or amend it. The effort made by [Swinny] was to enforce the contract. The amount of the commissions to be paid from time to time was by agreement to be determined by the parties. There was no agreement in contract requiring that the amount of commissions should be in writing. It expressed an agreement to pay commissions, the amount of which would be agreed upon later. From time to time, [Swinny] was paid one-eighth of one cent, and it was mutually understood that this was the amount of the commission. This agreement as to the amount of the commission does not vary the terms of the contract, and it is enforceable since the contract does not come within the terms of the Statute of Frauds . . . .[95]

c. *Finding Partial Integration*

> Parties can make their contracts in such forms as they see fit, and if they wish they can reduce some agreements to writing and leave others to oral expression and still others to partially oral and partially written form. A written agreement, though not a complete integration, may be the complete statement of certain things that have been negotiated out and agreed upon—the so-called "partial integration."[96]

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[94] *Id.*

[95] *Id.* at 798.

[96] Aboussie v. Aboussie, 441 F.2d 150, 154 (5th Cir.) (footnote omitted) (applying analogous Texas law), *withdrawn in part, on other grounds,* 446 F.2d 56

As a general proposition, for a Mississippi court to determine that a written agreement is not fully integrated, it must decide as a matter of law either that the writing is facially incomplete or that, when viewed in light of the totality of evidence regarding the transaction, the writing does not appear to be the complete embodiment of the terms relating to the subject matter of the writing.[97] Borrowing terminology more typically associated with questions of ambiguity, we may describe these two indicia of partial integration as "patent" incompleteness and "latent" incompleteness, respectively.[98]

1). Patent (Facial) Incompleteness

patent, or facial, incompleteness is easy to understand and apply in the context of the "three-tiered" process of construction and interpretation prescribed by *Pursue Energy Corp. v. Perkins*.[99] A written agreement may be facially incomplete be-

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(5th Cir. 1971).

[97] *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 210 cmt. c, at 118-19 (1981) ("It is often clear from the face of a writing that it is incomplete and cannot be more than a partially integrated agreement. Incompleteness may also be shown by other writings . . . . [o]r it may be shown by any relevant evidence . . . .").

[98] *See supra* subpart II.A.1 (discussing patent and latent ambiguity). A thorough review did not reveal any published Mississippi decision or commentary that uses these precise terms in the context of construing contracts; nonetheless, the terms are apt. The term "patently incomplete" (or some variation thereof) is invoked in a handful of reported contracts decisions. *See, e.g.*, Lichter v. Westinghouse Elec. Mfg. Co., 140 F.2d 597, 600 (6th Cir. 1944); Chicago, Rock Island & Pac. R.R. v. Furniture Forwarders of St. Louis, Inc., 272 F. Supp. 62, 64 (E.D. Mo. 1967), *aff'd*, 393 F.2d 537 (8th Cir. 1968); *In re* Big Cahaba Coal Co., 183 F. 662, 663 (N.D. Ala. 1910); *In re* Marriage of Bonds, 83 Cal. Rptr. 2d 783, 803 (Cal. Ct. App. 1999); *In re* Appeal of Dist. Council 88, Am. Fed'n of State, County & Mun. Employees, AFL-CIO, 430 A.2d 1217, 1220 (Pa. Commw. Ct. 1981); Hammond v. Wheeler, 347 S.W.2d 884, 894 (Mo. 1961); Merrick v. New York Subways Adver. Co., 178 N.Y.S.2d 814, 819 (N.Y. Sup. Ct. 1958); Blume v. MacGregor, 148 P.2d 656, 658 (Cal. Ct. App. 1944); Fireman's Fund Ins. Co. v. Davis, 155 S.E. 105, 107-08 (Ga. Ct. App. 1930); Cassetta v. Baima, 288 P. 830, 831 (Cal. Ct. App. 1930); Walsh v. Hunt, 52 P. 115, 116 (Cal. 1898). The term "latently incomplete" (or some variation thereof) is used in only one reported contracts decision. *See* Telephone Interconnect Corp. v. Bunch, 1982 WL 215188, at *2 (Va. Cir. Ct., Warren Cty. Mar. 31, 1982).

[99] 558 So. 2d 349, 352-53 (Miss. 1990). *See supra* notes 24-25 and accompany-

cause, *inter alia*, (1) blanks in the writing are not filled in,[100] (2) the writing explicitly refers to or incorporates a conversation or a past, contemporaneous, or future agreement not included with or in the writing,[101] or (3) the agreement omits necessary terms.[102]

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ing text.

[100] *See, e.g.*, Lore v. Smith, 133 So. 214, 215 (Miss. 1931) ("A writing is incomplete as an agreement where blanks as to essential matters are left in it, unless they can be supplied from other parts of the writing itself, or unless and until such blanks are lawfully filled.") (quotation omitted); *see also, e.g.*, Grant v. Imperial Motors, 539 F.2d 506, 510 (5th Cir. 1976) ("Obviously, the contracts are incomplete since blanks as to a material matter, the deduction of an acquisition charge from the finance charge to be refunded in the event of prepayment, are left therein.") (applying analogous Georgia law).

[101] *See, e.g.*, Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 657 (Miss. 1975) (holding that a written agreement including the phrase "per our conversation" was not the entire contract between the parties "since the conversation . . . was incorporated into it"); Swinny v. Cities Serv. Oil Co., 197 So. 2d 795, 796-97 (Miss. 1967) (holding that a written agreement clearly left a term to be later agreed upon by parties and was not fully integrated, despite presence of merger clause). *See generally* Valley Mills, Div. of Merchants Co. v. Southeastern Hatcheries of Miss., Inc., 145 So. 2d 698, 703 (Miss. 1962) ("Where the writing expressly refers to a conversation between the parties in reference to the subject-matter, the courts generally admit evidence of the conversation.").

See supra notes 91-95 and accompanying text for more discussion of the *Swinny* case.

[102] *See, e.g.*, Universal Computer Serv., Inc. v. Lyall, 464 So. 2d 69, 76 (Miss. 1985) (holding that where the written employment contract "only related to duties of employment, non-competition clauses, etc." and "did not address salary or commission," . . . [i]t therefore follow[ed] that the employment agreement [wa]s not the entire contract between the parties and therefore the chancellor was correct in admitting other evidence to evince the total agreement"); *see also* Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 547 (Miss. 1969) (finding extent of integration to be a fact issue where "[t]he particular writing asserted by Broome to constitute the contract is claimed by Beaver Lake not to be a complete and accurate integration of that instrument, because it omits the FHA approval clause"). *See generally* FARNSWORTH, *supra* note 3, § 7.15, at 327-31 (discussing omitted terms).

The mere fact that a term is omitted from a writing does not necessarily mean that the writing is not fully integrated and enforceable as written. *See, e.g.*, Bruce v. Bruce, 687 So. 2d 1199, 1203 (Miss. 1996) (finding no error in the trial court's refusal to modify written amended agreement due to the parties' failure to carry a provision in the original agreement regarding health insurance forward into an amended agreement). On the other hand, the omission of an essential term may make the contract unenforceable, obviating the need for construction and interpretation. *See, e.g.*, Duke v. Whatley, 580 So. 2d 1267, 1273-74 (Miss.

2). *Contextual (Latent) Incompleteness*

The second indicia of partial integration—that the writing does not appear to be the complete embodiment of the terms relating to the subject matter of the writing—is more elusive, particularly in light of the Mississippi Supreme Court's commitment to a "four corners" approach at the outset of any effort to construct or interpret a written instrument.[103] The best proof of contextual, or latent, incompleteness seems to be the existence of one or more collateral agreements between or among the parties to the written instrument before the court[104]—*assuming* that the court will consider evidence of collateral agreements in the face of a facially integrated written instrument.

For example, in *Chism v. Omlie*,[105] Omlie agreed to convey to Chism "a 428 acre ranch, certain designated farming equipment, and the furniture in the house on the ranch except 'personal things'" agreed to by the parties[106]:

> Thereafter Mrs. Omlie was permitted by Mrs. Chism to remove some clothing and other small items but Mrs. Chism refused to allow Mrs. Omlie to remove certain other items of personal property which Mrs. Omlie claimed she reserved as "personal things."
>
> Mrs. Omlie then filed this suit in chancery averring . . .

1991) ("While courts may supply reasonable terms which the parties omitted in the contracting process, such as a time for performance, essential terms such as price cannot be left as open ended questions in contracts which anticipate some future agreement.") (citing Smith v. Mavar, 21 So. 2d 810, 811 (Miss. 1945)).

[103] *See supra* notes 24-25 and accompanying text.

[104] *See, e.g.*, Knight v. McCain, 531 So. 2d 590, 595-96 (Miss. 1988); *Lyall*, 464 So. 2d at 76; *Valley Mills*, 145 So. 2d at 702; Chism v. Omlie, 124 So. 2d 286, 288-89 (Miss. 1960); Green v. Booth, 44 So. 784, 784 (Miss. 1907); *see also, e.g.*, Walley v. Bay Petroleum Corp., 312 F.2d 540, 544-45 (5th Cir. 1963) (applying Mississippi law) (holding that written agreement, which consisted of three documents, but which excluded alleged collateral agreement by seller's agent to sell on "competitive terms," was only partially integrated).

The *Walley* case is discussed more fully in the text accompanying *supra* notes 80-82. Collateral agreements in general are discussed more fully in subpart III.A.2.b, *infra*.

[105] 124 So. 2d 286 (Miss. 1960).

[106] *Chism*, 124 So. 2d at 287.

> that the parties agreed that the "personal things" referred to in the conveyance consisted of a dining room suite, bedroom suite, television, and various other household items which Mrs. Chism refused to allow Mrs. Omlie to remove from the ranch home. . . .[107]

At trial, Omlie

> and her witnesses testified as to the oral understanding between herself and [Chism]. She testified that she pointed out to [Chism] each item which is now in dispute and which [Omlie] was excepting, and that they agreed thereon; that it would not be necessary to list in the contract the excepted items because both of them understood what was meant by "personal things."[108]

The chancellor found that "the intention of the parties was that the 'personal things' excepted by Mrs. Omlie from the conveyance consisted of the dining room suite, bedroom suite, television, and other items sued for by Mrs. Omlie."[109] The supreme court affirmed:

> [T]he written agreement of the parties clearly shows that the parties had a collateral agreement concerning the personal property located in the ranch house, and that such agreement was not embodied in the writing. The writing shows clearly that the parties did not intend that the writing embody that element of their negotiations which concerned the furnishings in the ranch house. What the parties intended to do and that which they did was to enter into a collateral agreement which rested in parol and which was not integrated into the writing.[110]

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[107] *Id.* at 287-88.

[108] *Id.* at 288. Chism "objected to all such testimony, ... contend[ing] that this testimony was inadmissible under the rule that parol evidence may not be admitted to vary the terms of a written contract." *Id.* The common law parol evidence rule, and the many exceptions to it, are the subjects of Part III, *infra.*

[109] *Chism*, 124 So. 2d at 288.

[110] *Id.* at 288-89.

2. *Who Decides Whether and to What Extent an Instrument Is Integrated?*

Whether an agreement is integrated—and, if so, whether it is fully or only partially integrated—is determined by the trial court.[111]

3. *The Consequences of Integration or the Lack Thereof*

Why does it matter whether a particular contract is or is not integrated? Because, if the parties have made a written contract and if the written contract is fully integrated, then any evidence of any other prior or contemporaneous agreement between the same parties, regarding the same subject matter, is inadmissible for purposes of varying or contradicting the written agreement.[112]

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[111] RESTATEMENT (SECOND) OF CONTRACTS §§ 209(2) & 210(3) (1981). Professor Adams notes:

> [I]t is exclusively up to the trial judge, even in a jury trial, to decide whether a written contract is fully or partially integrated. This is because the parol evidence rule applies to exclude contradictory evidence only if the disputed terms are integrated . . . . [A] rule allowing the jury to consider any relevant evidence in deciding whether the writing was intended to be a complete integration without any limitations, would emasculate, if not repeal, the parol evidence rule.

Charles F. Adams, *Contract Litigation: The Roles of Judge and Jury and the Standards of Review on Appeal*, 28 WILLAMETTE L. REV. 223, 230 (1992) (quotation, footnotes, and emphasis omitted).

But see Fortune Furniture Mfg., Inc. v. Pate's Elec. Co., 356 So. 2d 1176, 1178 (Miss. 1978) ("Since the question whether the written contract was the final and complete expression of the agreement between the parties can be decided only on the basis of the evidence and since the evidence in this case was conflicting, it is clear that a jury issue was presented . . . ."). Apparently finding no support in this state's jurisprudence for the argument that integration was a question of fact, the *Fortune Furniture* court cites only non-Mississippi cases to support its conclusion. *Id.* (citing Putnam v. Dickinson, 142 N.W.2d 111 (N.D. 1966), and Spitz v. Brickhouse, 123 N.E.2d 117 (Ill. Ct. App. 1954)). In so doing, the *Fortune Furniture* court departed significantly from the "mainstream" of Mississippi case law, opting instead to anticipate the fact-based approach advocated by the *Restatement (Second) of Contracts* three years later. But *Fortune Furniture* overshot the *Restatement*, which recognized the factual element of the question of integration, but left its resolution to the trial judge, not the jury. See generally *supra* notes 11-25 and accompanying text for a discussion of the "majority" approach of the *Restatement* and the "minority" approach taken by the Mississippi Supreme Court in most cases.

Part III of this article discusses the parol evidence rule and the many exceptions to it at greater length.

C. Primary Rules of Construction and Interpretation

To clarify this vast cloud of legal rhetoric, a few rules should be set forth.[113]

Having conducted a "four corners" analysis and having found that writing is not fully integrated and unambiguous, Mississippi courts should apply one or more of the following "rules" in an effort to resolve the lack of integration or ambiguity before resorting to parol evidence.

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[112] As Professor Corbin put it, if the parties have made a written contract

> to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.

3 CORBIN, *supra* note 3, § 573, at 357 (footnote omitted). Thus, in the words of the Fifth Circuit, "parol evidence allegedly elucidating intent but contradicting the express terms of a written agreement is never admissible." Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1049 (5th Cir. 1971) (applying analogous Florida law).

The *Restatement (Second)* advises:

> The principal effects of a binding integrated agreement are to focus interpretation on the meaning of the terms embodied in the writing . . ., to discharge prior inconsistent agreements, and, in a case of complete integration, to discharge prior agreements within its scope regardless of consistency . . . . [T]he admissibility of evidence to contradict an integrated agreement or to add to a completely integrated agreement is restricted, and a limit is thus placed on the power of the trier of fact . . . .

RESTATEMENT (SECOND) OF CONTRACTS ch. 9, topic 3 intro. note, at 114-15.

[113] Midsouth Rail Corp. v. Citizens Bank & Trust Co., 697 So. 2d 451, 455 (Miss. 1997).

1. Afford Words and Phrases Their "Plain Meaning"

Courts should give each word and phrase in a written agreement its plain, ordinary, commonplace meaning,[114] unless doing so would cause a result that is contrary to the clearly manifested intention of the parties[115] or to law or public policy.[116]

An example of the first exception is *Paine v. Sanders*,[117] where the court pronounced:

> Where the testator's intention appears clearly from the will taken as a whole, this intention cannot be defeated because the testator's intention is expressed in ungrammatical language, or because his intention is expressed in inaccurate and incorrect language.[118]

The law and public policy exception was at issue in *Allstate Insurance Co. v. Chicago Insurance Co.*,[119] where both insurers tried to exercise the "other insurance" provisions of their respective policies, effectively depriving the insured of any coverage. The court invoked the "mutual repugnance" rule set forth in *Travelers Indemnity Co. v. Chappell*[120] and held that the plain meaning of each insurer's "other insurance" clause must be ignored:

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[114] *See* Independent Healthcare Mgmt., Inc. v. City of Bruce, No. 96-CA-00989-COA, 1998 WL 881795, at *4 (Miss. Ct. App. Dec. 18, 1998); *see also* First Nat'l Bank of Laurel v. Commercial Nat'l Bank & Trust Co., 157 So. 2d 502, 504 (Miss. 1963) ("Where a testator is not familiar with the technical meaning of words, the words used in the will are to be taken in their ordinary and common acceptance.").

[115] *See* RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(a) ("Unless a different intention is manifested, where language has a generally prevailing meaning, it is interpreted in accordance with that meaning . . . ."); *see also* Williams v. Batson, 187 So. 236, 238 (Miss. 1939) (en banc) ("The ordinary meaning of language throughout the country is given to words unless circumstances show that a different meaning is applicable.").

[116] *See* Allstate Ins. Co. v. Chicago Ins. Co., 676 So. 2d 271, 275 (Miss. 1996); *see also* Berry v. Lamar Life Ins. Co., 142 So. 445, 446 (Miss. 1932) ("[W]e have repeatedly announced that the court would enforce contracts made by parties, if not prohibited by law or public policy, according to the terms of the contracts."), *aff'd*, 145 So. 887 (Miss. 1933).

[117] 135 So. 2d 188 (Miss. 1961).

[118] *Paine*, 135 So. 2d at 191; *see also* Davenport v. Collins, 51 So. 449, 449 (Miss. 1910) (arguing for giving effect to testator's intent notwithstanding "any mere indistinctness in its phraseology, or awkwardness of expression, in the mere words used").

[119] 676 So. 2d 271 (Miss. 1996).

> The central problem posed by this matter is that while both policies cover the claim, each insurer has attempted to limit its respective liability and coordinate its insurance with the other policy. In so doing, both Allstate's and Chicago's "other insurance" clauses come into conflict. Standing alone, each policy would provide primary coverage.
>
> Allstate provides that its policy shall be primary to umbrella policies covering the same loss. The clause is not activated by Chicago's coverage of the claim because Chicago's insurance policy is not an umbrella policy. Chicago's policy, on the other hand contains a "pro rata" clause providing that where there are conflicting "other insurance" clauses, the loss shall be prorated among the insurers. . . .
>
> . . . .
>
> . . . Chicago's "other insurance" clause expressly provides that its coverage is in excess of all other coverage. In contrast, Allstate's "other insurance" clause expressly concedes that its coverage is primary. . . .
>
> * * *
>
> Each insurer in the present dispute seeks to shift to the other party its responsibility to the insured. Both parties are, in effect, arguing that "your excess exceeds my excess. . . ."
>
> . . . .
>
> We hold that the rule of repugnancy is applicable in cases in which "other insurance" clauses or "excessive coverage" clauses conflict. We have long followed the rule that the courts must enforce contracts as they are written, unless such enforcement is contrary to law or public policy. Syllogistic

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[120] 246 So. 2d 498 (Miss. 1971). In *Chappell*, the court stated:

> The view most often accepted is to the effect that when there is a conflict in the policies, escape v. escape, escape v. excess or excess v. excess, the two policies are indistinguishable in meaning and intent, (and therefore) one cannot rationally choose between them and must, therefore, be held to be mutually repugnant and must be disregarded.

Chappell, 246 So. 2d at 504 (quotation omitted).

> folly awaits the unwary justice who seeks to harmonize the conflicting terms presented herein using traditional rules of construction. Public policy and common sense must step in when legal jargon fails. Where competing insurance policies each contain conflicting "other insurance" clauses or "excessive coverage" clauses, the clauses shall not be applied and benefits under the policies shall instead be pro rated according to the coverage limits of each policy. . . .[121]

In cases not governed by the Mississippi Uniform Commercial Code,[122] the "plain meaning" of the contract's terms will prevail over any usage of trade, course of dealing, or course of performance not adopted by the contracting parties in the terms of the contract itself.

For example, in *Citizens National Bank of Meridian v. L.L. Glascock, Inc.*,[123] a contractor (Glascock) argued that he was entitled to be paid for supplemental work not within the terms of the written contract but orally requested by an agent of the owner.[124] Glascock based this argument on the custom in the construction industry by which a contractor will comply with "change requests" made by the owner or the owner's representative, with the understanding that satisfying "change requests" may cost the owner more than the original bid.[125] The owner (Citizens) argued that "the very purpose of the contract" was to protect against increased costs by obligating Glascock to complete the building for the lump sum of $679,560.[126] Declaring that a written contract "expresses the agreement of the parties and that it prevails over custom,"[127] the court then examined the specific contract provisions and summarized its findings as follows:

> Article 15 sets forth the method of payment for extra work,

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[121] *Allstate*, 676 So. 2d at 274-75 (citations and footnote omitted).

[122] MISS. CODE ANN. § 75-1-101 *et seq.* (1981 & Supp. 1998). *See infra* subpart III.D for a discussion of the admissibility of extrinsic evidence under the Code.

[123] 243 So. 2d 67 (Miss. 1971).

[124] *Citizens Nat'l Bank of Meridian*, 243 So. 2d at 68.

[125] *Id.* at 70.

[126] *Id.*

[127] *Id.*

> notable of which is that, "no extra work or change shall be made unless in pursuance of a written order from the owner," and Article 16 provides that in any event no claim for extra work shall be valid unless the contractor gives the architect written notice of his claim "before proceeding to execute the work. * * *" . . . .
>
> We can only conclude in comparing these plain terms to the vague assumption of the contractor that custom of the trade would [amend] the written document in his behalf, that the former prevails. The written contract anticipated every contingency upon which this suit was based . . . . The owner, being desirous of limiting its financial obligation, should not have its pocketbook exposed to the custom of architects and contractors unless it agrees thereto. . . .[128]

However, if the writing stipulates the meaning of a particular term, the stipulated meaning, rather than the "plain" meaning, will prevail[129]—as long as all conditions necessary to invoked the stipulated term are met.[130] Likewise, a technical term or term-of-art will prevail over a common-usage definition where the circumstances so dictate.[131]

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[128] *Id.* at 70-71. *But cf.* Independent Healthcare Mgmt., Inc. v. City of Bruce, No. 96-CA-00989-COA, 1998 WL 881795, at *4 (Miss. Ct. App. Dec. 18, 1998) ("In the context of a commercial lease, we conclude that we must give the meaning to the phraseology that is customarily afforded in the setting of commercial leases generally.").

[129] *See, e.g.*, Protective Life Ins. Co. v. Broadus, 205 So. 2d 925, 927 (Miss. 1968) (holding that an insured's disabling sickness was not covered because it was contracted and became manifest prior to the effective date of the insured's sickness and accident policy, which defined term "sickness" as sickness or disease contracted while the policy was in force); *see also, e.g.*, State Farm Mut. Auto. Ins. Co. v. Gregg, 526 So. 2d 554, 557 (Miss. 1988) (holding that an insurance policy covered chiropractic services because the definition of "medical services" in the policy was expansive enough to cover "healing arts in addition to practice of medicine"); Aetna Cas. & Sur. Co. v. Day, 487 So. 2d 830, 832 (Miss. 1986) (holding that a policy which failed to define the term "theft" necessarily covered temporary unlawful possession for purposes of vandalism); Bacot v. Duby, 724 So. 2d 410, 417-18 (Miss. Ct. App. 1998) (holding that, where instrument failed to define the term "land," the term would be afforded its usual legal meaning—to wit, the agreement conveyed both surface and mineral interests in designated property, despite the argument that the testatrix/grantor intended to transfer the surface interest to a different grantee).

[130] *See* Gunn v. Principal Cas. Ins. Co., 605 So. 2d 741, 742-43 (Miss. 1992) (recognizing that "words such as 'relative' may, by law, be restricted in scope or given meaning other than or different from common and ordinary usage," but

2. Construe the Contract as a Whole

Courts should avoid "ascertaining the meaning of a contract by resort to solitary or fragmentary parts of the instrument."[132] "The language used in a single clause or sentence is not to control as against the evident purpose and intention" of the contracting parties as shown by the whole document.[133] In construing a particular provision, a court should look at the instrument as a whole and determine the provision's meaning in the context of the entire agreement.[134]

If a contract consists of more than one document, or if a

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refusing to apply policy definition of "relative" to uninsured motorist (UM) portion of policy because definition stated "As used throughout this policy and shown in bold type . . . Relative means" and the term "relative" appearing in UM provision was not "shown in bold type").

[131] *See* Miller v. Fowler, 28 So. 2d 837, 838 (Miss. 1947) ("The language of a contract must be given its usual and ordinary meaning, unless it is clear the certain words or terms are employed in a technical sense."); *see also* Johnson *ex rel.* Blocket v. U.S. Fidelity & Guar. Ins. Co., 726 So. 2d 167, 169 (Miss. 1998) (construing "use" in the Mississippi Uninsured Motorist Act, MISS. CODE ANN. § 83-11-103(b) (1991), as "a legal term of art with a broad definition in this context"). *But see* First Nat'l Bank of Laurel v. Commercial Nat'l Bank & Trust Co., 157 So. 2d 502, 504 (Miss. 1963) ("Where a testator is not familiar with the technical meaning of words, the words used in the will are to be taken in their ordinary and common acceptance.").

[132] Texaco, Inc. v. Kennedy, 271 So. 2d 450, 452 (Miss. 1973); *see also* Kyle v. Wood, 86 So. 2d 881, 886 (Miss. 1956) ("[I]ntention is to be collected . . . from a consideration of all provisions of the instrument and every part thereof, taken together, rather than from any particular clause, sentence or form of words."), *quoted with approval in* Carlisle v. Estate of Carlisle, 233 So. 2d 803, 804 (Miss. 1970).

[133] *Kyle*, 86 So. 2d at 886. *Accord Carlisle*, 233 So. 2d at 804-05.

[134] *See* Holloman v. Holloman, 691 So. 2d 897, 899 (Miss. 1996); Brown v. Hartford Ins. Co., 606 So. 2d 122, 126 (Miss. 1992); *Kennedy*, 271 So. 2d at 452; Hewitt v. Frazier, 219 So. 2d 149, 153 (Miss. 1969); Mitchell v. Eagle Motor Lines, Inc., 87 So. 2d 466, 469 (Miss. 1956); Hines Motor Co. v. Hederman, 30 So. 2d 70, 72 (Miss. 1947); Continental Cas. Co. v. Pierce, 154 So. 279, 281 (Miss. 1934); Harris v. Townsend, 58 So. 529, 529 (Miss. 1912); Freeman v. Greenville Convalescent Home, Inc., No. 96-CA-00466-COA, 1998 WL 881772, at *5 (Miss. Ct. App. Dec. 18, 1998). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (1981).

contract incorporates another document by reference, then all documents comprising the contract or transaction should be read together to give full effect to the intent of the parties.[135]

For example, in *Garrett v. Hart*,[136] the written contract stated that certain houses "would be 'constructed according to the plans and specifications in the hands of William Garrett, which have been mutually agreed upon by and between' the parties."[137] The defendants (Schneider's estate and Hart) argued that the written contract did not bind them to pay the plaintiff (Garrett) in full because Garrett had failed to complete the houses that were the subject of the contract.[138] The chancellor recognized that the written contract was, standing alone, incomplete; nonetheless, he found for Garrett by reading the contract together with the plans and specification incorporated by the contract.[139] The supreme court upheld the chancellor's ruling:

> From the reading of the instrument it does not contain all details necessary to build a house—shell or complete—and it is necessary to look elsewhere. There were plans and specifications prepared and in the hands of Mr. Garrett which were to guide the construction, and these were to be initialed. The drawing designated as plans and specifications, signed by Mr. Schneider, was exhibited to the bill of complaint, and was admitted as Exhibit C to Mr. Garrett's testimony. There was no other set of plans and specifications submitted by anyone in the records. . . .[140]

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[135] *See* United Miss. Bank v. GMAC Mortgage Co., 615 So. 2d 1174, 1176 (Miss. 1993); Stockett v. Exxon Corp., 312 So. 2d 709, 711-12 (Miss. 1975); Williams v. Batson, 187 So. 236, 238 (Miss. 1939) (en banc); Doe v. Bernard, 15 Miss. 319, 323 (1846).

[136] 168 So. 2d 497 (Miss. 1964).

[137] *Garrett*, 168 So. 2d at 503.

[138] *Id.* at 499-503.

[139] *Id.* at 503.

[140] *Id.; see also, e.g.*, Mississippi State Hwy. Comm'n v. Patterson Enters., Ltd., 627 So. 2d 261, 263 (Miss. 1993) ("As the subcontract contained a clause incorporating the terms of the prime contract, the claim prohibition against the commission in the prime contract merged into the subcontract. Therefore, when Mallette accepted final payment, even though doing so over Patterson's objection, any claim Patterson or Mallette might have had against the commission was extin-

As the court explained in *Gilchrist Tractor Co. v. Stribling*:[141]

> [I]n the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same contracting parties, for the same purpose, and in the course of the same transaction will be considered and construed together, since they are, in the eyes of the law, one contract or instrument.
>
> Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice so that the intent of the parties may be carried out and the whole agreement actually made may be effectuated.
>
> Where the terms employed to express some particular condition of a contract are ambiguous and cannot be satisfactorily explained by reference to other parts of the contract and the parties have made other contracts in respect of the same subject matter, apparently in pursuance of the same general purpose, it is always permissible to examine all of them together in aid of the interpretation of the particular condition; and if it is found that the ambiguous terms have a plain meaning by a comparison of the several contracts and an examination of their provisions, that meaning should be attributed to them in the particular condition.[142]

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guished under the terms of the prime contract. . . .").

[141] 192 So. 2d 409 (Miss. 1966).

[142] *Gilchrist*, 192 So. 2d at 417-18 (quotations and citations omitted).

Applying the principles to the facts of the case before it, the *Gilchrist Tractor* court found that there was no ambiguity or lack of integration once the various agreements at issue were read together.

> In this case, the parties first entered into a preliminary written agreement which provided, among other things, that further written agreements would be made later, dealing more specifically with each of the several aspects of the transaction. This was done, and these contracts, prepared later in the light of the developed facts, supplemented the original written agreements and superseded prior oral agreements, if any. They dealt with the same subject matter and the contracting par-

3. Afford Each Provision Meaning and Purpose

Mississippi law presumes that parties who go to the effort to consummate a written contract intend for each word and provision of the contract to have meaning and purpose.[143] Therefore, Mississippi courts should construe contracts, if possible, so that no word or provision is rendered "repugnant, senseless, ineffective, meaningless, or incapable of being carried out in the overall context of the transaction consistently with all of the other provisions" of the contract.[144]

> ties were the same. Under the circumstances here, each document is a component part of the contract covering the over-all agreement, and all must be considered together in order to determine the intention of the parties as finally arrived at . . . . The provision relating to the Cook credit is not ambiguous, and, in any event, it must be considered in the context of the whole agreement.

Id. at 417.

In *Stockett v. Exxon Corp.*, the defendants argued that the trial court had erred by reading the various documents together rather than construing the third amendment to a land purchase option agreement in isolation. Stockett v. Exxon Corp., 312 So. 2d 709, 719 (Miss. 1975). The court made short shrift of the defendants' argument:

> Defendants contend . . . . [t]hat the third amendment to the land purchase option should be isolated and separated from all of the other instruments and construed by itself and, if so construed, the third amendment was without consideration because admittedly the $10 cash consideration recited therein was not paid.
>
> This argument is without any merit. It is perfectly obvious to us, as it was to the trial judge, that it takes all of these instruments to make the mosaic of this most complicated matter. All are inextricably woven into the warp and woof of the cloth. It is impossible to remove a part without destroying the whole.

Id. at 711-12.

[143] *See* Glantz Contracting Co. v. General Elec. Co., 379 So. 2d 912, 917 (Miss. 1980); Freeman v. Greenville Convalescent Home, Inc., No. 96-CA-00466-COA, 1998 WL 881772, at *5 (Miss. Ct. App. Dec. 18, 1998).

[144] Wilson Indus., Inc. v. Newton County Bank, 245 So. 2d 27, 30 (Miss. 1971). *Accord Freeman*, 1998 WL 881772, at *5; *see also* Williams v. Batson, 187 So. 236, 239 (Miss. 1939) (en banc) ("An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect."). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1981) ("[A]n interpretation which gives a reasonable, lawful, and effective mean-

Put another way, Mississippi courts should, if possible, give effect "to all words, clauses and provisions of the instrument, if they are not inconsistent with each other or with the general intent of the whole [instrument] when taken as an entirety, . . . unless the court is satisfied that no [particular] effect was intended to be given a particular word or phrase."[145] No word or provision should be construed to nullify or strike some other word or provision "unless such a result is fairly inescapable."[146]

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ing to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect . . . ."); *id.* cmt. b, at 93 ("Since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous.").

In *Harris v. Townsend*, the dispute before the court was the construction of a note promising that "[o]n demand or at my death I or my estate" would pay the amount indicated on the face of the note ($292.50). Harris v. Townsend, 58 So. 529, 529 (Miss. 1912). The question was: At what time did the statute of limitations begin to run on the obligee's claim for repayment? *Id.* The court stated:

> The contention of appellant is that the words "or at my death" and the words "or my estate" in this note are surplusage, that therefore it was collectible on demand, and consequently the statute of limitations began to run . . . immediately upon its execution, or, if these words are not surplusage, that appellee still had the right to collect it, and if necessary to institute suit on it, immediately upon its execution, and that consequently the statute of limitations began to run at that time.
>
> Neither of these positions are tenable. We must, if possible, in construing any contract, give effect to each word contained in it; and, if the language thereof is plain and unambiguous, it is unnecessary to invoke any rule of construction in order to interpret it. While the intention of the parties to this note is succinctly, it could not have been more plainly, expressed.
>
> It is clear that the payee had a right to collect the note at any time she so desired during the life of the maker, and also that she had the option of waiting until his death to collect it. It is true that she had the right to sue on the note at any time she so desired, but it is also true that she had a right to wait until the death of the maker so to do; and consequently the statute of limitations did not begin to run until that event occurred.

Id.

[145] Paine v. Sanders, 135 So. 2d 188, 191 (Miss. 1961) (quotation omitted).

[146] Continental Cas. Co. v. Pierce, 154 So. 279, 281 (Miss. 1934); *accord* Peoples Bank & Trust Co. v. Nettleton Fox Hunting & Fishing Ass'n, 672 So. 2d 1235, 1239 (Miss. 1996); Manson v. Magee, 534 So. 2d 545, 548 (Miss. 1988).

In *Continental Casualty Co. v. Pierce*,[147] the issue for the court was whether the injury of one employee (Pierce), suffered while riding in the employer's car driven by a fellow employee (Toney), was covered by the employer's (Easterling's) insurance policy, despite the exclusion in the employer's policy for injuries to her employees.[148] The policy contained two pertinent provisions:

> Clause A is in this language: "Hereby agrees to Insure the Assured Named in the Schedule Against Loss . . . for damages on account of bodily injuries . . . accidentally suffered . . . within the policy period by any person or persons, by reason of the ownership, maintenance or use (including loading or unloading) of any of the automobiles described in the Schedule; excluding injuries suffered by any employee of the Assured while operating or caring for the automobiles covered hereby, and also excluding injuries suffered by any employee while in the course of his employment in the usual trade, business or profession of the Assured . . . ."
>
> The other clause is in this language: "Additional Assureds. If the automobiles covered by this policy are 'private passenger' or 'commercial' automobiles any person or persons while riding in or operating any of such automobiles and any person, firm or corporation responsible for the operation thereof, shall be considered as an additional Assured under this policy . . . . The coverage afforded by this paragraph shall not apply unless the riding, use or operation above referred to be with the permission of the Assured named in the Schedule of this policy . . . ."
>
> . . . [U]nder Clause A employees of the insured are expressly excluded while operating or caring for the automobile "covered hereby," and the policy also expressly excluded employees of the insured while in the course of their employment in the usual trade, business, or profession of the insured. Clearly, John Toney, the driver of the automobile, and appellee [Pierce], who was engaged in her usual employment as Mrs. Easterling's servant, come within these exclusions. In

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[147] 154 So. 279 (Miss. 1934).

[148] *Pierce*, 154 So. at 280.

> other words, the policy did not protect Mrs. Easterling against liability for injuries received by either of them. The trouble arises out of this language under the subsequent clause entitled "Additional Assureds" . . . . The argument is that under that language John Toney was an additional assured; that he was insured against liability for appellee's injury, although Mrs. Easterling, to whom the policy was issued, was not insured against such liability.[149]

Expressing its desire not to strike any part of the policy "unless such a result is fairly inescapable,"[150] the court held that the Additional Assureds provision could not be read so as to extend coverage to injuries to Easterling's employees, which are explicitly excluded by Clause A, because doing so "would require the writing into the policy of something which is not there, and the striking out of something which is there, to hold that the coverage of the policy included an employee of hers who[se injury], according to the terms of the policy, was expressly excluded therefrom."[151]

In *Brown v. Hartford Insurance Co.*,[152] the subject insurance policy provided the following definition for purposes of the policy's uninsured motorist (UM) coverage:

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[149] *Id.* at 281.

[150] *Id.*

[151] *Id.*

The court also dispensed with Pierce's proposed construction as unreasonable:

> The construction contended for by appellee [Pierce] is not a reasonable one. It is hard to conceive that an insurance company would write a policy of that kind. For illustration: If Mrs. Easterling had been driving the automobile accompanied by appellee, her employee, and the latter had been injured by her negligent driving, clearly the policy would not have protected Mrs. Easterling against liability for such injury, because it expressly so provides. But according to appellee's contention, the policy does insure Mrs. Easterling's servant, John Toney, against liability for an injury to appellee resulting from his negligent driving. In other words, Mrs. Easterling, who procured the policy and paid the premium therefor, would not be insured, while her servant, John Toney, who had nothing to do with procuring the policy, would be insured. We are of opinion that the contract bears no such construction.

Id. at 281-82. The maxim that contracts should be construed in a reasonable (and fair) manner is the subject of subpart II.C.4, *infra.*

[152] 606 So. 2d 122 (Miss. 1992).

> C. Uninsured motor vehicle means a land motor vehicle or trailer of any type:
>
> 1. To which no bodily injury liability or policy applies at the time of the accident.
> 2. To which a bodily injury liability bond or policy applies at the time of the accident. In this case its limit for bodily injury liability must be less than the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which your covered auto is principally garaged.
> 3. Which is a hit and run vehicle whose operator or owner cannot be identified and which hits:
>   a. you or any family member;
>   b. a vehicle which you or any family member are occupying; or
>   c. your covered auto.[153]

The issue for the supreme court was whether UM coverage was available if there was no physical contact between an insured and uninsured vehicle:

> Clause C contains three sub-parts, but the contract does not expressly state whether all three sub-parts must be met, or whether each sub-part individually defines an uninsured vehicle. That is to say, should the sub-parts be read as being separated by the word "and" or the word "or?" When construing a contract, we read the contract as a whole, so as to give effect to all of its clauses. Viewing Clause C in light of this rule, physical contact is not required when an uninsured vehicle or its driver are identified. This is so because both subclauses 1 and 2 describe vehicles and drivers that are identified, while sub-clause 3 describes a hit and run vehicle, which leaves the scene of an accident, and consequently cannot be identified. To require an insured to identify a hit and run vehicle would render the insured's protection from a hit and run vehicle meaningless.[154]

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[153] *Brown*, 606 So. 2d at 125 (emphasis omitted).

[154] *Id.* at 125-26 (citations omitted).

Following this same logic, courts should give meaning and effect to an amendment that is separate and apart from that afforded to the contract it amends because "[a]n amendment to a contract presumably amended something."[155]

4. *Require a Fair and Reasonable Construction*

A proffered construction or interpretation "must be reasonable to warrant adoption."[156] Mississippi courts should give the words of an instrument "a reasonable construction, where that is possible, rather than an unreasonable one,"[157] and should avoid constructions that "give words a meaning they will not bear."[158] A construction leading to an absurd, harsh, or unreasonable result should be avoided, unless the terms are express and lend themselves to no other reasonable interpretation.[159]

In *Frazier v. Northeast Mississippi Shopping Center, Inc.*,[160] the parties entered into a written lease which had a primary term of eight years, starting September 1, 1964, and afforded the lessees, (the Fraziers) two four-year options to extend the lease under the same terms and conditions applying to the primary term.[161] The lease provided, in part: "If the

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[155] Freeman v. Greenville Convalescent Home, Inc., No. 96-CA-00466-COA, 1998 WL 881772, at *5 (Miss. Ct. App. Dec. 18, 1998).

[156] Lehman-Roberts Co. v. State Highway Comm'n of Miss., 673 So. 2d 742, 744 (Miss. 1996); *see* Frazier v. Northeast Miss. Shopping Ctr., Inc., 458 So. 2d 1051, 1054 (Miss. 1984); *see also* Rubel v. Rubel, 75 So. 2d 59, 65 (Miss. 1954) ("[T]he words of a contract should be given a reasonable construction, where that is possible, rather than an unreasonable one . . . ."); Williams v. Batson, 187 So. 236, 239 (Miss. 1939) (en banc) ("An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect.").

[157] Mississippi Rice Growers Ass'n (A.A.L.) v. Pigott, 191 So. 2d 399, 403 (Miss. 1966); *see* Leach v. Tingle, 586 So. 2d 799, 802 (Miss. 1991).

[158] *Leach*, 586 So. 2d at 802; *see* Hicks v. Bridges, 580 So. 2d 743, 746 (Miss. 1991); Hutton v. Hutton, 119 So. 2d 369, 374 (Miss.), *cert. denied*, 364 U.S. 834 (1960).

[159] *See Frazier*, 458 So. 2d at 1054; *Pigott*, 191 So. 2d at 403; *Rubel*, 75 So. 2d at 65; McCain v. Lamar Life Ins. Co., 172 So. 495, 500 (Miss. 1937).

[160] 458 So. 2d 1051 (Miss. 1984).

[161] *Frazier*, 458 So. 2d at 1052.

Lessees elect to renew the lease under said option, said lessees must give the Lessor written notice not less than 6 months prior to the end of the term of this lease."[162] The lease further provided:

> Five years after start of lease, Lessee has the option to request Lessor to expand the building an additional 20 feet or any part thereof, at the rear at an annual rental increase of 18-percent of total gross additional construction cost . . . . If the option to expand is exercised, it is understood that this lease, inclusive of all options, shall be beginning anew.[163]

On or about February 20, 1980, during the last year of the second renewal term, the Fraziers sought to exercise the option for additional space, but the lessor (Shopping Center) refused.[164] The Fraziers sued for, but were denied, a declaratory judgment.[165] On appeal, the Fraziers argued that they had "a clear, unambiguous right to extend the lease by their letter dated February 20, 1980."[166] The Shopping Center responded that "a clear interpretation of the lease" provided the Fraziers with "a period of five years from and after September 1, 1964, the beginning of the lease, in which to exercise the rights contained in this particular paragraph, and no longer."[167]

The Mississippi Supreme Court affirmed the chancery court's judgment for the Shopping Center:

> We content ourselves with fully agreeing with the chancellor that it was manifestly unreasonable for the Fraziers to wait some fifteen years and five months after the start of the lease, and just a little more than six months before its end, to exercise their rights under this paragraph.
>
> There was no increase in rent for sixteen years in a centrally located shopping center in one of the liveliest cities in this state. To claim that by this February 20, 1980, letter the

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[162] *Id.*

[163] *Id.* (emphasis omitted).

[164] *Id.*

[165] *Id.* at 1053.

[166] *Id.*

[167] *Id.* at 1053-54.

> Fraziers extended the lease for another eight, twelve or sixteen years at the same rent is simply incredible.
>
> Parties are bound by what they promise in writing. But, we are not bound to adopt a construction not compelled by the instrument in which we would have to believe no man in his right mind would have agreed to.[168]

The court concluded that

> the right granted the Fraziers was a simple option, given without additional consideration, which they were free to exercise or ignore. On the other hand, until the time for the exercise of the option had expired, Shopping Center was bound by the option it granted. Shopping Center had no right to compel its exercise, or even be notified by the Fraziers of their intent to exercise the option until the right expired. It is for this reason Courts generally hold that time is of the essence in exercising a simple option. . . .
>
> The Fraziers had the right to exercise the option five years after September 1, 1964, which was August 31, 1969. We must agree with the chancellor that the Fraziers had no right to wait over ten years following in which to exercise the option.[169]

In *Lehman-Roberts Co. v. State Highway Commission*,[170] Lehman-Roberts agreed to perform "random clearing" work related to a highway construction project conducted under the Commission's auspices.[171] The contract called for the Commission to pay Lehman-Roberts $4,000 per acre, based on an estimate of 82 acres of random clearing.[172] The Commission ultimately paid Lehman-Roberts $401,716—compared to the original $328,000 estimate—for clearing 101.929 acres.[173] Lehman-Roberts claimed that it was entitled to payment for clearing 174.44 acres and sued for the balance due according to that claim.[174]

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[168] *Id.* at 1054.
[169] *Id.* at 1054-55.
[170] 673 So. 2d 742 (Miss. 1996).
[171] *Lehman Roberts Co.*, 673 So. 2d at 742.
[172] *Id.* at 742.
[173] *Id.* at 742-43.

The contract provision at the heart of the parties' dispute provided:

> The limits of clearing shall be 60 feet (horizontal measure) from the centerline, both left and right of centerline *as directed by the engineer*. The area measured for payment for random clearing will be the acres actually cleared of trees and will not include any paved areas or any areas which do not contain trees.[175]

The Mississippi Supreme Court concluded that the provision could not reasonably bear the construction that Lehman-Roberts proposed:

> Lehman-Roberts claims that it was required to clear a 60-foot zone, from the centerline of the roadway out to the 60-foot limit of clearing line, anywhere up and down the highway the engineer directed clearing. Lehman-Roberts interpreted the contract provisions as providing for payment for clearing the 60-foot zone, less the pavement which was specifically excluded from the payment . . . .
>
> . . . . Lehman-Roberts knew from the beginning that only 82 acres of random clearing had been estimated for the project. It claims, however, that if a portion of the project has trees located on it and it was directed to clear trees, no matter how many in number, it was to be paid for clearing from the edge of the pavement to the 60-foot limit. . . .
>
> . . . .The language of the clause first sets out what must be cleared, and that is what is directed by the engineer. The next part of the clause sets out what areas would be pay areas, and those are the areas not paved containing trees. Lehman-Roberts claims that the paved areas are specifically excluded, therefore they understand why they do not get paid for that 12 feet. The shoulder and slope are as well excluded if they do not contain trees. Lehman-Roberts would have the phrase "any areas which do not contain trees" mean that the engineer would not direct them to clear such area. Further-

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[174] *Id.* at 743.

[175] *Id.* at 742.

> more, Lehman-Roberts would have the phrase "payment for random clearing will be the acres actually cleared of trees" mean they are entitled to payment based on a 48-foot width, no matter how many trees were at that particular station. Lehman-Roberts would have the Commission pay for areas not actually cleared.
>
> Where there is a dispute as to the meaning of a contract clause, a party's interpretation must be reasonable to warrant adoption . . . . The Lehman-Roberts interpretation is unreasonable. The parties may have interpreted the clause differently, but it is not ambiguous.[176]

Mississippi courts should also "endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other."[177]

In *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.*,[178] the court was asked to decide whether a hospital (Gulf Coast) was justified under the terms of its contract with its manager/owner (Qualicare) in declaring Qualicare in material breach and terminating the contract because Qualicare unilaterally raised hospital rates over which Gulf Coast had "both final and immediate authority" under the terms of their contract.[179] The court found itself

> confronted with a rather novel situation. UHS-Qualicare has done something—raise the rates—which Gulf Coast by a simple resolution of its Board of Directors, if not by a letter from its president, has unequivocal authority to override—immediately.
>
> . . . .

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[176] *Id.* at 744 (citations omitted).

[177] Rubel v. Rubel, 75 So. 2d 59, 65 (Miss. 1954); *accord* Mississippi Rice Growers Ass'n (A.A.L.) v. Pigott, 191 So. 2d 399, 403 (Miss. 1966); *see also* Citizens' Bank v. Frazier, 127 So. 716, 717 (Miss. 1930) (holding that Mississippi courts are obligated "to give to a contract a construction or interpretation, if possible, which will square its terms with fairness and reasonableness, each party towards the other . . . .").

[178] 525 So. 2d 746 (Miss. 1987).

[179] *UHS-Qualicare*, 525 So. 2d at 755.

> The novel situation we confront today is one about which the contract provides no express directive. Put abstractly, the question is this: where one party to a contract acts with respect to a matter where the other has unqualified authority, has the acting party breached materially? Assuming arguendo that the acting party has breached the contract, is the other party allowed the radical remedy of termination where it has complete power of cure, where it could by its own action supersede the offending act of the other? The question suggests its own answer: No, absent express contractual language to the contrary.
>
> * * *
>
> Absent clear language to the contrary, we regard it wholly unreasonable that the language of a twenty year, multimillion dollar contract, be read to provide that any failure (whether material or not) to keep, observe or perform, etc. will suffice to trigger the termination clause. Such a result would be productive of great economic waste. An implied requirement that breaches justifying termination be material is only fair, while the contrary reading could only produce harsh, unreasonable, expensive and unintended consequences. The concept of material breach is sufficiently familiar and well-known that contracting parties and their drafting attorneys are charged with knowledge of it. If they wish to exclude it from their contract, they must do so clearly.[180]

The court concluded:

> Moreover, in its termination efforts Gulf Coast was obviously thinking in terms of material breaches. In its July 12, 1983, letter, Gulf coast states "We regard each of the foregoing as material breaches . . . ." The August 15, 1983, letter twice refers to "material breaches." Nothing in the record suggests that, until time came for its lawyers to write their brief, Gulf Coast ever considered that it had authority to invoke the termination clause in the event of breaches not "material."[181]

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[180] *Id.* at 755-56 (emphasis omitted).

[181] *Id.* at 756.

5. *Avoid Illegality*

Mississippi law presumes that contracts are made for lawful purposes.[182] Therefore, if a contract or contractual provision is susceptible to two reasonable constructions, one of which comports with statutory law, regulation, common law, or public policy and one of which does not, the court should construe the contract or contractual provision in such a way as to make it legal.[183]

For example, in *Grandberry v. Mortgage Bond & Trust Co.*,[184] the second (MB&T) and third (Grandberry) lienholder. against a parcel of improved real property orally agreed that MB&T—who was initiating the foreclosure sale—would bid enough at the sale to cover the principal and interest due on the second lien and the agreed amount of $1,646 toward the third lien.[185] In reliance on that oral promise, Grandberry did not attend the foreclosure sale. MB&T, however, bought the property in foreclosure for less than the amount of its lien, thereby cutting off Grandberry. When Grandberry complained, MB&T answered that the alleged oral agreement was unenforceable, *inter alia*, as against the statute of frauds.[186] The Mississippi Supreme Court disagreed:

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[182] *See* Wilson Indus., Inc. v. Newton County Bank, 245 So. 2d 27, 31 (Miss. 1971) ("[W]rongdoing will not be presumed and in the absence of any proof to the contrary, it is proper to indulge a presumption that in their business and social relations all persons act honestly and properly."); *see also* Orgill Bros. v. Perry, 128 So. 755, 757 (Miss. 1930) ("There is always a prima facie presumption of law of right doing, not wrong doing.").

[183] *See* Security Ins. Agency, Inc. v. Cox, 299 So. 2d 192, 194 (Miss. 1974); Crabb v. Comer, 200 So. 133, 135 (Miss. 1941); Citizens' Bank v. Frazier, 127 So. 716, 717 (Miss. 1930); Clay v. Allen, 63 Miss. 426, 430-31 (1886); Merril v. Melchior, 30 Miss. 516, 531 (1855); Riley's Adm'rs v. Vanhouten, 5 Miss. 428, 429 (1840); *see also* Williams v. Batson, 187 So. 236, 239 (Miss. 1939) (en banc) ("An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect."); Orrell v. Bay Mfg. Co., 40 So. 429, 430 (Miss. 1906) ("Where a contract is susceptible of two interpretations and capable of being fulfilled in two distinct ways, one permitted [sic] and the other condemned by the law, that construction will be placed upon the contract which will validate it. The law presumes a lawful intent, instead of an illegal one, on the part of all contracting parties."). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 203(a) & cmt. c (1981) (favoring "lawful" constructions over "unlawful" ones); *id.* § 207 ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred.").

[184] 132 So. 334 (Miss. 1931).

[185] *Grandberry*, 132 So. at 334-35.

> Keeping in mind the general principle that, viewing all the terms of an agreement and all the surrounding circumstances, it is the duty of courts to give to a contract that construction or interpretation, if possible, . . . so as to make it legal, rather than take another course of construction which would make it illegal, we think there is no title to land involved here, nor any payment of the debt of another, but simply that the effect of the agreement was that appellee, so far as any rights or interest of appellants were concerned, should start the bidding at the aggregate amount of the [second] deed of trust, plus the agreed amount, $1,646, which appellants were to have out of their deed of trust, plus costs of sale. . . .
>
> . . . . [A]n agreement between parties, uniting their interest as lienholders, as to the division among themselves of the proceeds of a foreclosure sale, or as to the distribution or sharing of profits and losses between them in respect to such proceeds, is not within the statute of frauds, either in letter or spirit . . . .[187]

6. Avoid Implied Terms

Mississippi courts do not favor implying terms into written agreements[188]:

> [U]nless the implication be indispensable or inescapable, courts will be reluctant to embark upon the dangerous venture of importing into an agreement, by declaratory resort to implication, what so far as the court may definitely know was not at the moment of the contract actually agreed upon by the

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[186] *Id.* at 335.

[187] *Id.* at 335-36 (citation omitted).

[188] *See Williams*, 187 So. at 239 ("The court should not interpolate into or eliminate from a written contract words of material legal consequence in order to uphold it."); *see, e.g.*, Great Atl. & Pac. Tea Co. v. Lackey, 397 So. 2d 1100, 1102-03 (Miss. 1981) (refusing to imply covenant to maintain general merchandise business on leased premises where lease provided for "a fixed substantial adequate minimum rent" not tied to revenues of any business so situated).

> parties, and particularly must this be true where, as here, the parties have at much pains and in detail undertaken to reduce their agreement to such specific written terms as to evince their purpose to expressly cover every phase of their understanding.[189]

In *J.O. Hooker & Sons, Inc. v. Roberts Cabinet Co.*,[190] the defendant, Hooker,

> served as the general contractor for the renovation of residences owned by the Bessemer Public Housing Authority ("BPHA") in Bessemer, Alabama. The renovation involved tearing out fixtures, such as cabinets, and Hooker's contract with the BPHA provided that the BPHA, as the owner of the property, had the option to either keep or salvage fixtures which needed to be torn out during the renovation process . . . . Under said general contract, the cabinets were to become the property of Hooker and to be removed by him in the event that the BPHA elected not to keep said cabinets.
>
> Hooker entered into a subcontract agreement with Roberts . . . , pursuant to which Roberts was required to "furnish cabinets, tops, plastic laminates on walls and furr [sic] down materials and fronts for hot water heaters as per plans and specs for the price listed below." The agreement also provided that "the price includes the cost of tear-out (sic.) old cabinets and installation of new cabinets."[191]

A dispute arose between Hooker and Roberts as to who was responsible for disposing of the cabinets, as required in the Hooker-BPHA contract:

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[189] Goff v. Jacobs, 145 So. 728, 729 (Miss. 1933) (citation omitted).

In *Goff*, the court was asked to read a term in the written agreement that one party was "to assume all 1930 taxes" to mean that the party was, in fact, to be responsible for all drainage taxes in subsequent years, as well. *Goff*, 145 So. at 729. The court was not so inclined:

> [W]e are directly requested to read into the written agreement between these parties a further provision, and to insert that provision to the same effect as if expressly therein written by the parties, that the purchaser would assume these drainage taxes and assessments not only for the year 1930, but "for all subsequent years." To such a request we are constrained to return a negative response.

Id.

[190] 683 So. 2d 396 (Miss. 1996).

[191] *J.O. Hooker*, 683 So. 2d at 398.

> Roberts asserted that the subcontract did not obligate him to dispose of the cabinets, but Hooker contend[ed] that the "as per specs and plans" language in the subcontract agreement served to incorporate by reference the general contract and that Roberts thus assumed Hooker's duties to dispose of the cabinets.[192]

The *Hooker* court observed:

> [T]he subcontract in the present case is clear and unambiguous in that it clearly provides that Roberts' bid price includes the cost of tearing out and installing new cabinets, but is completely silent as to any duty on the part of Roberts to dispose of the cabinets. Hooker concedes that the subcontract with Roberts was silent on this issue, but argues that the "specifications for the general contract disclosed that this was within the kitchen cabinet portion of the job." . . .
>
> Hooker asserts that "[t]he specifications on the kitchen cabinet portion of the job, included in the Roberts-Hooker contract by reference, provided that the scope of the job included removing all existing kitchen cabinets and shelves and disposing of them in accordance with local laws and ordinances." It is true that the subcontract refers to the "plans and specs" of the general contract, but said language does not in any way indicate an intent by Roberts to assume additional and expensive duties which were not set forth in the subcontract. The term "as per specs and plans" is better understood as applying to the "furnish[ing]" of cabinets and not to their "removal."[193]

The parties cited several cases in support of their respective arguments, none of which, in the opinion of the court, provided "strong authority" to resolve their dispute.[194] Instead, the court turned to whether Hooker raised a genuine issue of material fact regarding Roberts' duty to dispose of the cabinets that was sufficient to defeat Roberts' motion for summary judgment.[195] The court explained:

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[192] *Id.* at 399.

[193] *Id.* at 400-01.

[194] *Id.* at 401.

> Hooker asserted in his affidavit that:
>
> > It is very rare for a subcontractor such as Roberts not to do their own cleanup. The only time we have ever contracted with a sub-contractor who did not handle their own cleanup was when the job was within driving distance of our office in Thaxton, Mississippi.
>
> The duty of Hooker to remove the cabinets in the present case, however, arose from specific and detailed contractual provisions entered into between Hooker and the BPHA. The subcontract agreement, as noted earlier, expressly provided that the bid price included the "tear-out" and installation of the cabinets. If Hooker had desired that Roberts be obligated to assume the specific contractual obligations set forth in the general contract to dispose of the cabinets, then it would have been a simple matter to include in the subcontract language obligating Roberts to do so.
>
> It would have been highly advisable for Hooker to have insisted on such language in the subcontract, regardless of his understandings regarding industry customs. This Court is hesitant to find that parties have impliedly assumed obligations to perform expensive duties based on vague assertions of industry custom when the assumption of said duties could easily have been provided for in the subcontract. This Court is especially reluctant to do so in the present case, given that the duties involved are not general obligations to remove materials, but rather specific tasks which Hooker contractually obligated himself to perform.
>
> On these facts, this Court concludes that, as a matter of law, Roberts did not assume the specific contractual duties relating to the removal of the cabinets, and that there accordingly exists no genuine issues of material fact with regard to this issue.[196]

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[195] *Id.*

[196] *Id.* at 401-02.

Implied terms are generally permitted in only two types of cases. First, implied terms are permitted when necessary to effectuate the intent of the parties as evidenced by the agreement as a whole.[197] Examples of this type of case include implying (1) that a contract which sets no time for performance must be performed within a "reasonable" time, considering the condition and circumstances of the parties, and may not be terminated without reasonable notice to the party whose performance is subject to the "reasonable time" requirement;[198] (2) that, "in the absence of some provision in the contract authorizing termination or cancellation, every contract is presumed irrevocable";[199] and, (3) that, "[w]here a contract is performable on the occurrence of a future event, there is an implied agreement that neither party will place any obstacle in the way of the happening of such event, and where a party is himself the cause of the failure he cannot rely on such condition to defeat his liability."[200]

Implied terms are also permitted when they arise by operation of law, such as the implied warranty of habitability;[201]

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[197] *See* REO Indus., Inc. v. Natural Gas Pipeline Co. of Am., 932 F.2d 447, 455-56 (5th Cir. 1991) ("[I]t must appear from the express terms of the contract that the implied term was so clearly in the contemplation of the parties that they deemed it unnecessary to express it, or the implied term must be indispensable to give effect to the intent of the parties as disclosed by the contract as a whole."). Namely,

> [i]f there is to be any implication, it must result from the language employed in the instrument or be indispensable to carry the intention of the parties into effect. Terms are to be implied in a contract, not because they are reasonable, but because they are necessarily involved in the contractual relationship so that the parties must have intended them and have only failed to express them because of sheer inadvertence or because they are too obvious to need expression.

17A AM. JUR. 2d *Contracts* § 379, at 399-400 (1991).

[198] *See, e.g.*, Warwick v. Matheny, 603 So. 2d 330, 335-37 (Miss. 1992).

[199] *Id.* at 336; *accord* Garner v. Hickman, 733 So. 2d 191, 195-96 (Miss. 1999); Ham Marine, Inc. v. Dresser Indus., Inc., 72 F.3d 454, 460 (5th Cir. 1995) (applying Mississippi law).

[200] *Warwick*, 603 So. 2d at 337. *Accord Garner*, 733 So. 2d at 195.

[201] *See* Oliver v. City Builders, Inc., 303 So. 2d 466, 470 (Miss. 1974) (Inzer, J., specially concurring); Brown v. Elton Chalk, Inc., 358 So. 2d 721, 722 (Miss. 1978).

the implied duty of good faith and fair dealing;[202] and the im-

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In *Oliver*, eight of nine justices recognized that an implied warranty of habitability should be read into a contract between the builder-vendor of a new home and the first purchaser of that home, notwithstanding that the builder-vendor and purchaser had reduced the terms of their transaction to a writing that would otherwise merge all prior agreements and understandings. *See Oliver*, 303 So. 2d at 469-70 (Inzer, J., specially concurring, joined by Rodgers, P.J., and Patterson, Walker, and Broom, JJ.); *id.* at 470-73 (Robertson, J., dissenting, joined by Gillespie, C.J., and Sugg, J.). However, because the plaintiff was not the original purchaser of the home, the specially concurring justices joined Justice Smith in affirming the circuit court's judgment in favor of the builder because the warranty was too "remote." *See id.* at 470 (Inzer, J., specially concurring). The dissenting justices did not adopt the distinction between first purchasers of new homes and remote purchasers, relying on prior decisions of the court regarding privity of contract issues. *See id.* at 470-72 (Robertson, J., dissenting). Ultimately, the dissenting justices in *Oliver* won the day on the issue of privity. *See* Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670, 672-73 (Miss. 1983) (abrogating privity requirement so that a remote home purchaser may sue the builder for breach of the implied warranty).

[202] *See* General Motors Acceptance Corp. v. Baymon, 732 So. 2d 262, 269 (Miss. 1999); Merchants & Planters Bank v. Williamson, 691 So. 2d 398, 405 (Miss. 1997); Cenac v. Murry, 609 So. 2d 1257, 1272 (Miss. 1992); UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc., 525 So. 2d 746, 757 (Miss. 1987); *see also* MISS. CODE ANN. § 75-1-203 (1981). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

In *Cenac*, for example, the Cenacs purchased a country store from the Murrys by executing a contract for deed, whereby the Cenacs would make a down payment and monthly payments for ten years, at the end of which the Murrys would transfer title to the Cenacs. *Cenac*, 609 So. 2d at 1259. The court noted that

> a final clause in the agreement stated that, if the purchaser chose not to exercise her right to purchase, the contract would become null and void, and all rights of the purchaser would be forfeited and terminated. All money and other consideration paid by the purchaser to the seller would be retained by the sellers free of any claim from the purchaser, it being agreed that such sums constitute a reasonable rental fee for the property and a reasonable sum as liquidated damages to the sellers if the right to purchase were not exercised.

Id. at 1260.

Some 18 months into the deal, the Cenacs sued the Murrys, seeking to rescind the contract, alleging, *inter alia*, breach of the duty of good faith and fair dealing. *Id.* The Cenacs chronicled numerous accounts of bizarre and offensive behavior by the Murrys, which the Cenacs claimed was aimed at forcing them to abandon the store before they gained title to it. *Id.* at 1260. The Mississippi Supreme Court found that the Murrys had, in fact, breached the covenant of good faith and fair dealing implied into their contract with the Cenacs:

plied warranties of title,[203] merchantability,[204] and fitness for a particular purpose[205] set forth in Article 2 of the Mis-

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> Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party. The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness or reasonableness.
>
> . . . The Cenacs argue that Murry has breached the covenant of good faith pointing to Murry's abusive, aberrant, intimidating, harassing behavior which has made their life a living hell. We agree. We trust that the facts of this case establish Murry's breach of the good faith duty and have nothing to add. Murry's motive is clear. With $30,000.00 in hand and $925.00 monthly payments for each month for ten years, Murry would also get the store back, a healthy windfall, if he could only drive the Cenacs out of town forcing a forfeiture of the contract. In addition to Murry's bizarre behavior, he clearly misrepresented material facts to the Cenacs when they were negotiating for the "purchase" of the store.

Id. at 1272-73.

[203] MISS. CODE ANN. §§ 75-2-312 and 75-2A-211 (1972 & Supp. 1999); *see, e.g.*, Huff v. Hobgood, 549 So. 2d 951, 953-54 (Miss. 1989); Hicks v. Thomas, 516 So. 2d 1344, 1348 (Miss. 1987).

The Mississippi Supreme Court has also recognized an implied warranty of title which attaches to the sale of a non-negotiable chose in action such that, "if the chose is a nullity, the assignee may recover its price irrespective of the seller's ignorance of the defect." Gilchrist Tractor Co. v. Stribling, 192 So. 2d 409, 417 (Miss. 1966). This implied warranty exists, according to the *Gilchrist Tractor* court, even thought the sale or assignment is made "without recourse." *Id.*

[204] MISS. CODE ANN. §§ 75-2-314 and 75-2A-212; *see, e.g.*, Gast v. Rogers-Dingus Chevrolet, 585 So. 2d 725, 728 (Miss. 1991); Settlemires v. Jones, 736 So. 2d 471, 473-74 (Miss. Ct. App. 1999).

In *Beck Enterprises, Inc. v. Hester*, the Mississippi Supreme Court held that section 75-2-314 applies to both new and used goods, although used goods are reasonably expected to require more maintenance and repair. *See* Beck Enterprises, Inc. v. Hester, 512 So. 2d 672, 675 (Miss. 1987); *accord Settlemires*, 736 So. 2d at 473-74. If the used goods conform to the quality of other similar used goods, they will normally be merchantable. *Beck Enterprises*, 512 So. 2d at 675; *Settlemires*, 736 So. 2d at 474.

The implied warranty of merchantability may not be waived or disclaimed, except as permitted by statute. MISS. CODE ANN. § 11-7-18 (Supp. 1999); *id.* § 75-2-315.1 (Supp. 1999); *see Gast*, 585 So. 2d at 728; State Farm Mut. Auto. Ins. Co. v. Ford Motor Co., 736 So. 2d 384, 390 (Miss. Ct. App. 1999).

[205] MISS. CODE ANN. §§ 75-2-315 and 75-2A-213; *see, e.g.*, J.L. Teel Co. v. Houston United Sales, Inc., 491 So. 2d 851, 859 (Miss. 1986); Massey-Ferguson, Inc. v. Evans, 406 So. 2d 15, 17-18 (Miss. 1981).

The implied warranty of fitness for a particular purpose, like the implied warranty of merchantability, may not be waived or disclaimed, except as permitsissippi Uniform Commercial Code.

7. Account for Surrounding Circumstances

When construing and interpreting a contract, a court should take into account the circumstances surrounding the formation of the contract.[206] In so doing, the court should place itself, as near as possible, in the exact situation of the parties when they executed the instrument, so as to determine their intentions, the objects to be accomplished, obligations created, time of performance, duration, mutuality, and other essential features.[207]

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ted by statute. MISS. CODE ANN. § 11-7-18; *id.* § 75-2-315.1; *see Gast*, 585 So. 2d at 728; *J.L. Teel*, 491 So. 2d at 859.

[206] *See* Williams v. Batson, 187 So. 236, 238 (Miss. 1939) (en banc); *see, e.g.*, Griffin v. Tall Timbers Dev., Inc., 681 So. 2d 546, 551 (Miss. 1996) ("In construing covenants imposing restrictions and burdens on use of land, . . . the restriction and burden will be construed in light of the circumstances surrounding its formulation, with the idea of carrying out its object, purpose and intent . . . ."). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. a, at 115 (1981) ("[B]oth integrated and unintegrated agreements are to be read in the light of the circumstances and may be explained or supplemented by operative usages of trade, by the course of dealing between the parties, and by the course of performance of the agreement."); *id.* § 201 cmt. b, at 83-84 ("Uncertainties in the meaning of words are ordinarily greatly reduced by the context in which they are used. . . . In general, the context relevant to interpretation of a bargain is the context common to both parties.").

[207] As the *Restatement (Second)* states:

> In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position [the parties] occupied at the time the contract was made. When the parties have adopted a writing as a final expression of their agreement, interpretation is directed to the meaning of that writing in the light of the circumstances. The circumstances for this purpose *include the entire situation, as it appeared to the parties, and in appropriate cases may include facts known to one party of which the other had reason to know.*

RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. b, at 87 (emphasis added) (internal reference omitted); *see also Williams*, 187 So. at 238 ("The standard of interpretation of an integration (written instrument), except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person *acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration,* other than oral statements by the parties of what they intended it to mean." (emphasis added)).

For example, in *McKee v. McKee*,[208] the court construed an agreement distributing property formerly held by a partnership comprised of a brother (John) and sister (Margaret) in order to determine who had the best claim to 69.6 acres of property formerly a part of a $15,000,000 partnership estate as follows:

> One thing on which the parties agree is that John made an original proposal for the division of property in a letter . . . dated October 15, 1983. In the letter he admittedly offered Margaret the "Klondike Place", totaling approximately 973 acres, a portion of which was the disputed 60 (61 in the letter) acres of the Chism purchase. On the next page of the letter, he stated that he would receive "60 acres of the Chism property—Roper Place—and the Dunn Cut, 25 acres.". . .
>
> . . . . On December 30, 1983, Margaret listed her understanding of the property division. In this listing, she received a "Klondike Place" totaling 973 acres. John received a 60 acre tract described as "Roper", with "Chism" handwritten beside the word Roper. The total acreage for Margaret was 3720 gross acres and 3480 cultivatable acres. John's total acreage

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[208] 568 So. 2d 262 (Miss. 1990). The dispute in *McKee* centered around the following tracts of land:

> (1) Klondike Place: A large tract of land which may or may not contain the 69.6 acres at issue. Regardless of where those 70 acres end up, both parties agree that Margaret is entitled to "the Klondike Place." She claims that it should contain 973 acres, while her brother maintains that it comprises 912 acres, more or less. With the 9.6 acres around the Taylor Ginning Company removed, the Klondike Place contains only 903 acres.
> (2) Chism Property: 120 acres of land purchased in 1973 by J & M McKee from the M.E. Chism Estate. It is comprised of two (2) separate rectangular tracts of approximately sixty (60) acres each . . . .
> (3) Dunn Cut: A 25 acre tract of land which is mentioned most often in connection with the "Roper cut." . . .
> (4) "The 9.6 Acres": A tract of land which may or may not be part of the Taylor Ginning Company. John claims it is an integral part of the operation of Taylor Ginning Co., and since he received the Company under the property division agreement, he claims that he should receive it as well. Margaret maintains that it should go to her as part of the Klondike Place.

Id. at 265-66 (emphasis omitted).

> was 3680 gross acres, and 3440 cultivatable acres. . . . [T]he "final" agreement was signed by the parties on January 7 and 9. . . .
>
> The final signed document signed by both parties, states on page two that Margaret was to receive the identical 3720/3480 ratio of gross to cultivatable acreage mentioned previously, while John was to receive 3680/3440, also as before. Considering the amount of confusion generated by the terminology used to refer to the various tracts, this is one of the few logical pieces of information this Court was able to find in the record or the exhibits. It also purports to be the final agreement of the parties.
>
> Under general principles of contract law, one should look to the "four corners" of a contract whenever possible to determine how to interpret it. Of course, this is possible only when the intent of the parties is "clear or unambiguous." The "contract" at issue here cannot be characterized as such. In fact, an examination of various "canons" of contract construction is likewise of little help. The only remaining step is to consider the "totality of circumstances" surrounding the final contract, which has been done. The final agreement in the case *sub judice* makes no sense unless it is examined in conjunction with other correspondence between the parties.
>
> . . . [A] combined reading of the various written correspondence leads to a more internally harmonious result. The chancellor's decision on this point is manifestly contrary to a total reading of all prior documents, and therefore is reversed, with the disputed 60 acres of the Chism property awarded to Margaret. Under this interpretation, the total number of acres awarded to each party is consistent with all previously agreed- to documents.
>
> . . . The 9.6 acres in question lies immediately adjacent to the Taylor Ginning Company and has apparently been used for years as a disposal or refuse site for the Company. The parties seem to agree that John is to receive the entity known as "Taylor Ginning Company" pursuant to the terms of the agreement. John maintains that the agreement also encompasses the 9.6 acre adjacent disposal site; Margaret claims it does not.
>
> In the documents transmitted between the parties, the "Taylor Ginning Company" is mentioned many times, but

> exactly what this means is never made clear . . . .
>
> John testified at the hearing that he believed the Gin Company owned the 9.6 acres in question. Whether this is in fact true, he convincingly described the importance of the 9.6 acres to the ginning operation; Margaret was unable to provide equally convincing proof in support of her contention. Unlike the facts surrounding the Klondike Place/Chism/Roper dispute, the Gin Company was described in only the most general of terms in the correspondence between Margaret and John, and the 9.6 acres was never specifically mentioned at all. Therefore, the chancellor was within his discretion in awarding the 9.6 acre dump site to John. There is no contrary indication from the surrounding documents.[209]

In *Payne v. Campbell*,[210] Mullins had leased the land in question to Morehead, reserving a royalty of one-eighth (1/8) of the oil and gas produced on the land.[211] Mullins then conveyed to Hodge:

> [o]ne-half (1/2) of the whole of any oil, gas or other minerals, except sulphur, on and under and to be produced from said lands; delivery of said royalties to be made to the purchaser herein in the same manner as is provided for the delivery of royalties by any present or future mineral lease affecting said lands.[212]

Hodge, in turn, granted to Payne "three-eighths (3/8) of the whole of any oil, gas or other minerals," under said lands.[213] The question for the court was whether the one-half granted by Mullins to Hodge was properly read as one-half of Mullins's one-eighth royalty interest or a one-half royalty interest—in which case, Mullins would have granted to Payne more than Mullins could grant—and, therefore, whether Payne's interest was three-eighths of Hodge's one-half of Mullins's one-eighth (3/64 of the whole) or three-eighths of one-half (3/16 or 12/64 of the whole).[214]

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[209] *Id.* at 266-67 (emphasis, citations and footnote omitted).

[210] 164 So. 2d 780 (Miss. 1964).

[211] *Payne*, 164 So. 2d at 783.

[212] *Id.* at 782.

[213] *Id.*

Ruling that the "one-half" grant had to be read both in the context of the entire granting instrument and in light of the circumstances surrounding Mullins's grant of the interest to Hodge, the court concluded that Mullins had granted to Hodge only one-sixteenth; therefore, Hodge could grant Payne only 3/64:

> When the aforesaid royalty deeds were executed there was outstanding of record a ten-year mineral lease executed by Joe V. Mullins and wife to E. G. Morehead dated February 9, 1943, which provided for the payment to lessors a royalty of 1/8 of the oil and gas produced . . . .
>
> The usual royalty provided for in oil leases in Mississippi prior to and at the time of the execution of the royalty deed from Joe V. Mullins and wife to T. F. Hodge on March 28, 1944, was a 1/8 of the whole of all oil, gas and other minerals, except sulphur. At that time the prevailing price being paid landowners per royalty acre in Amite County was $5 to $7 per acre. The amount paid by Hodge to Mullins for said royalty conveyance was $1,000, or $6.51 per acre, if the royalty deed is interpreted as conveying a 1/2 of 1/8 of the oil and gas produced from said lands . . . .
>
> The chancellor entered a decree adjudging that the deed from Joe V. Mullins and wife to T. F. Hodge dated March 28, 1944, conveyed 1/2 of 1/8 royalty in the oil, gas and other minerals, except sulphur, in and under the lands involved . . . .
>
> * * *
>
> Only one royalty was conveyed by the Mullins to Hodge and it was to be paid out of and deducted from the present or any future lease. It would be impossible to deduct a 1/2 royalty from the 1/8 royalty provided for in the then existing lease. The interpretation made by the trial court is reasonable, conforms to the manifest intention of the parties, the usages of the oil business, and avoids unreasonable results.
>
> Appellants contend that the said royalty conveyances are plain and unambiguous and need no interpretation by the

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[214] *Id.* at 784.

> court, and the royalty conveyed by Mullins to Hodge was stated as 1/2 of the whole of any oil, gas and other minerals produced from the lands. This may be true if the conveyances were considered in a vacuum separate and apart from the lease referred to therein and without considering the circumstances of the parties and the subject matter. But . . . . [t]he words of the conveyance should be considered in the context in which they are used. We are of the opinion that when the royalty conveyance from Mullins to Hodge is applied to the thing on which it operates, it is ambiguous. Therefore, evidence showing all the circumstances surrounding the transactions was admissible. . . .[215]

Unless the parties clearly manifest a contrary intent "surrounding circumstances" may include any prior course of dealing between the parties,[216] as well as any operative usages of trade.[217] Courts should also construe all contracts in light of any applicable state or federal law or constitutional provision in effect at the time the contract was formed.[218]

Generally, Mississippi courts will not consider evidence of surrounding circumstances unless their "four corners" analysis of the written agreement suggests that the agreement is ambiguous, incomplete, or both.[219]

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[215] *Id.* at 783-84 (citations omitted).

[216] A "course of dealing" is "a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." RESTATEMENT (SECOND) OF CONTRACTS § 223(1) (1981); *see also* MISS. CODE ANN. § 75-1-205(1) (1972). For a more thorough discussion of the role of course-of-dealing evidence in construing and interpreting contracts under the Mississippi Uniform Commercial Code, see *infra* subpart III.D.2.a.

[217] A "usage of trade" can refer either to a habitual or customary *practice* in a particular trade or location, or to a *meaning* ascribed to a word or phrase that is commonly understood by those in a particular trade or location. *See* RESTATEMENT (SECOND) OF CONTRACTS § 219 cmt. a, at 146; *see also* MISS. CODE ANN. § 75-1-205(2). For a more thorough discussion of the role of trade usages in construing and interpreting contracts under the Mississippi Uniform Commercial Code, see *infra* subpart III.D.2.b.

[218] *See, e.g.*, Johnson *ex rel.* Blocket v. U.S. Fidelity & Guar. Ins. Co., 726 So. 2d 167, 169 (Miss. 1998); Atlanta Cas. Co. v. Payne, 603 So. 2d 343, 348-49 (Miss. 1992); Switzer v. Switzer, 460 So. 2d 843, 845-46 (Miss. 1984); Houston Gen. Ins. Co. v. Maples, 375 So. 2d 1012, 1015 (Miss. 1979); Dunnam v. State Farm Mut. Auto. Ins. Co., 366 So. 2d 668, 670 (Miss. 1979).

At issue in *Tufts v. Greenwald*[220] was whether a term calling for the plaintiff to deliver a soda fountain to the defendant "as soon as possible" contemplated that the plaintiff, who both manufactured and sold soda fountains, would manufacture and deliver a soda fountain to the defendant "as soon as possible," or that the plaintiff would deliver an already-manufactured soda fountain to the defendant "as soon as possible."[221] The facts latter construction would have favored the defendant:

> In the case before us the terms of the agreement may refer indifferently to a soda fountain to be thereafter manufactured and consigned to the defendants, or to one then in existence, to be immediately forwarded. The plaintiff says that, by reason of the fact that he was a manufacturer, he construed the contract to mean that the fountain was to be manufactured and sent to the defendants, and that this was done as soon as practicable. The defendants say that they intended to order a fountain then in stock, and ready for immediate shipment, and that this was well understood by the agent of plaintiff.[222]

Because of this ambiguity, the Mississippi Supreme Court held that the trial court

> did not err in permitting the defendant Greenwald to testify that the contract made between his firm and the agent of the plaintiff was for the purchase of a soda-water fountain then

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[219] *See supra* notes 23-25 and accompanying text; *see, e.g.*, State *ex rel.* Lafayette County v. Hall, 8 So. 464, 464 (Miss. 1891) ("We recognize the correctness of the legal proposition upon which the argument of appellant's counsel rests, *viz.*, that, where a contract or obligation is expressed in ambiguous terms, and therefore admits of two interpretations, the circumstances under which it was entered into, and the understanding of the parties, may be resorted to in aid of its construction. But this is a mere rule of interpretation, and cannot be appealed to for the purpose of creating an ambiguity in an instrument which is unequivocal in its language, and of well settled legal import."); *see also, e.g.*, O.J. Stanton & Co. v. Mississippi State Hwy. Comm'n, 370 So. 2d 909, 915 (Miss. 1979) (refusing to consider evidence of trade usage and custom absent ambiguity).

[220] 6 So. 156 (Miss. 1889).

[221] *Tufts*, 6 So. at 157.

[222] *Id.*

> represented by the agent to be in stock and capable of immediate shipment. The testimony did not tend to contradict the written agreement, but to apply it to its subject-matter. There is nothing in the agreement or order of shipment indicating that the plaintiff was to manufacture for the defendants a soda fountain, but, because he was a manufacturer and known to be such by the defendants, he assumed that the shipment was to be as soon "as possible" after the fountain should have been made by him, and because it was so shipped that the defendants were by their contract bound to accept it. The plaintiff thus unconsciously appeals to the same principle from which his objection seeks to preclude the defendant, viz., that a contract shall be interpreted by the circumstances and conditions under which it was entered into. It is not competent to contradict or vary the written words which the parties have selected as the exponent of their contract, but, where the language used is susceptible of different meanings, the law says it means what the parties understood it to mean.[223]

8. *Consider the Parties' Own "Practical Construction"*

Mississippi courts, asked to construe a facially unclear instrument, should consider the interpretation placed upon the instrument by the parties (and their successors) in seeking the intent of the parties.[224] As the court in *Sumter Lumber Co. v. Skipper*[225] counseled:

> The rules for the construction of deeds or contracts are designed to ascertain and to follow the actual or probable intention of the parties and are: When the language of the deed or contract is clear, definite, explicit, harmonious in all its provisions, and free from ambiguity throughout, the court looks solely to the language used in the instrument itself, and will give effect to each and all its parts as written. When, however, the language falls short of the qualities above mentioned and resort must be had to extrinsic aid, the court will look to the subject matter embraced therein, to the particular

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[223] *Id.*

[224] *See* St. Regis Pulp & Paper Corp. v. Floyd, 238 So. 2d 740, 744 (Miss. 1970).

[225] 184 So. 296 (Miss. 1938).

> situation of the parties who made the instrument, and to the general situation touching the subject matter, that is to say, to all the conditions surrounding the parties at the time of the execution of the instrument, and to what, as may be fairly assumed, they had in contemplation in respect to all such said surrounding conditions, giving weight also to the future developments thereinabout which were reasonably to be anticipated or expected by them; and when the parties have for some time proceeded with or under the deed or contract, a large measure, and sometimes a controlling measure, of regard will be given to the practical construction which the parties themselves have given it, this on the common sense proposition that actions generally speak even louder than words.[226]

In *Weeks v. Mississippi College*,[227] one of the plaintiffs' great-great-grandfathers had donated a sum of money to Mississippi College in the 1850s, in return for which he had received a written "scholarship certificate," which read, in relevant part:

> This is to certify that Dr. E.G. Banks of Clinton, having paid to the Mississippi College scholarship Note for the sum of Five Hundred Dollars with accrued interest, now he, the said Dr. E.G. Banks, his heirs, executors, administrators, or assigns are entitled to a Perpetual Scholarship in said Mississippi College.[228]

The certificate was used on numerous occasions by various persons claiming rights to the certificate through E.G. Banks, and "the College's records indicate[d] that the college repeatedly honored the certificate for tuition in various amounts for various students whenever the certificate was presented or upon the written request" of the daughter or granddaughter of

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[226] *Sumpter Lumber*, 184 So. at 298-99; *accord* Quinn v. Mississippi State Univ., 720 So. 2d 843, 850-51 (Miss. 1998); Farragut v. Massey, 612 So. 2d 325, 329 (Miss. 1992).

[227] No. 98-CA-00245-COA, 1999 WL 410552 (Miss. Ct. App. June 22, 1999).

[228] *Weeks*, 1999 WL 410552, at *1.

E.G. Banks.[229]

In 1991, plaintiff David Weeks sought to send his wife, plaintiff Susan Weeks, to Mississippi College using the scholarship certificate to pay all of her educational expenses for four years. The College responded that it would honor the certificate for tuition in the amount of one course per semester.[230] The Weekses sued. At trial, the chancellor, having reviewed evidence of the certificate's historical use, "held that the certificate entitled the user to the greater of $100 tuition credit or one course per semester."[231] On appeal, the Weekses argued that, because the chancellor had found the certificate to be ambiguous, he should have construed it strictly against the College under the rule of *contra proferentem.*[232] The court of appeals affirmed, holding that, while the certificate was ambiguous, the rule of *contra proferentem* should yield when the "practical construction" given to the ambiguous certificate over the years clearly supported the chancellor's judgment:

> The great fallacy of their argument is their claim that the chancellor found that the term "scholarship," in its ambiguity, meant either "full" scholarship rights of free tuition, fees and expenses of attending college, or some lesser or limited amount thereof. The chancellor only found that the term was ambiguous. Having made that determination, he then found it proper, in construing the term "scholarship," to accord considerable weight to the evidence of the actual performance of the contract. This Court finds that, as a matter of law, it was proper for him to so rule. This, so-called, "practical construction" rule of interpretation was applied by the Mississippi Supreme Court in *St. Regis Pulp & Paper Corp. v. Floyd,* 238 So. 2d 740 (Miss. 1970), where it held that the interpretation placed upon the instrument by the original contracting parties and by their successors deserves consideration . . . .[233]

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[229] *Id.* at *1-2.

[230] *Id.* at *1.

[231] *Id.*

[232] *See id.* at *5-6. *See generally infra* subpart II.D.1.

[233] *Weeks,* 1999 WL 410552, at *6 (citation omitted).

D. Secondary Rules of Construction and Interpretation

In addition to, or sometimes in conjunction with, the primary rules of construction and interpretation just discussed, Mississippi courts also rely from time to time on a number of "secondary" rules. These secondary rules are easier both to define and to apply than the foregoing, more general principles. However, a court should apply the following secondary rules only if two or more provisions of a contract, or two or more reasonable readings of the provisions of a contract, remain uncertain after the court has applied the foregoing primary rules.[234]

In response to a citation to the case of *City of Cincinnati v. Cincinnati Gaslight & Coke Co.*, the *Weeks* court found

> that each of those requirements was satisfied in the case at bar. From the first instance of its use, up to the complained of instance, the course of dealing between the heirs and assigns under the certificate and the College was uniform, unquestioned, and fully concurred in by both parties. The course of conduct consisted of either, tuition credit in the amount of $100 or the cost of one course per semester.

Weeks, 1999 WL 410552, at *7. *See* City of Cincinnati v. Cincinnati Gaslight & Coke Co., 41 N.E. 239, 241 (Ohio 1895) (holding that "[t]o have any value as a practical construction, the course of dealing should be uniform, unquestioned, and fully concurred in by both parties.").

[234] *See* Williams v. Batson, 187 So. 236, 238 (Miss. 1939) (en banc) (recognizing availability of "several secondary rules" of interpretation that may be applied "[w]hen, *but not unless*, the meaning to be given to a written instrument remains uncertain after applying thereto . . . the primary rules in aid [of interpretation]"); *see, e.g.*, *Weeks*, 1999 WL 410552, at *5-6 (electing to resolve ambiguity by following parties' "practical construction" of contract, rather than following maxim of *contra proferentem* advocated by appellants).

Writing about these secondary maxims of construction and interpretation, Professor Patterson has observed:

> There is some doubt whether they have reliable guidance value for judges, or are merely justifications for decisions arrived at on other grounds, which may or may not be revealed in the opinion. This rather cynical view is supported by two observations. One is that for any given maxim that would persuade a judge to a certain conclusion a contrary maxim may be found that would persuade him to the opposite (or contradictory) conclusion . . . .
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> . . . .
>
> The second reason . . . for believing that the [secondary] maxims of interpretation are ceremonial rather than persuasive is that in many instances the court will set forth in its opinion the whole battery of

1. *Contra Proferentem* (Construe Against the Drafting Party)

Ambiguous contract terms are construed most strongly against the party responsible for drafting them.[235]

2. *Noscitur a Sociis* (Take Words in Their Immediate Context)

The meaning of a word may be affected by its immediate context.[236] Therefore, a court should construe or interpret a word in the context of the terms immediately preceding and following it.[237]

> maxims and then proceed to decide the case on the basis of an analysis of the terms of the contract and the facts of the dispute, *without indicating which maxim or maxims, if any, were applied or invoked in reaching that decision.*

Patterson, *supra* note 3, at 852-53 (emphasis added).

[235] *See* Wallace v. United Mississippi Bank, 726 So. 2d 578, 588 (Miss. 1998); Love Petroleum Co. v. Atlantic Oil Producing Co., 152 So. 829, 831 (Miss. 1934); *see, e.g.*, Wade v. Selby, 722 So. 2d 698, 701 (Miss. 1998); Farragut v. Massey, 612 So. 2d 325, 330 (Miss. 1992); Merchants Nat'l Bank v. Stewart, 608 So. 2d 1120, 1126 (Miss. 1992); Leach v. Tingle, 586 So. 2d 799, 801 (Miss. 1991); Stampley v. Gilbert, 332 So. 2d 61, 63 (Miss. 1976); Globe Music Corp. v. Johnson, 84 So. 2d 509, 511 (Miss. 1956); *see also* Estate of Parker v. Dorchak, 673 So. 2d 1379, 1381-82 (Miss. 1996) (recognizing this "well-known canon of construction," but recognizing that another canon of construction applied to facts of the case led to different resolution than would be reached if the court relied solely on *contra proferentem*; and, therefore, concluding that contract was ambiguous).

The presumption against the drafter is less pronounced when the other party has taken an active role in the drafting process or is particularly knowledgeable. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206 reporter's note, at 105-06 (1981), and cases cited therein.

Contra proferentem is by far the most frequently invoked secondary maxim in the reported Mississippi cases. Any substantive discussion of the numerous insurance policy cases in which Mississippi courts have invoked this maxim would significantly lengthen this article. As it is, the discussion of insurance policy construction undertaken herein consumes 14 pages. *See infra* subpart II.E.4.

[236] *See* Evans v. City of Jackson, 30 So. 2d 315, 317 (Miss. 1947) ("[U]nder the doctrine of *noscitur a sociis* . . . the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it."). *See generally* Patterson, *supra* note 3, at 853 ("*Noscitur a sociis*. The meaning of a word in a series is affected by the others in the same series; or, a word may be affected by its immediate context.").

[237] *See Evans*, 30 So. 2d at 317 (stating that closely situated words, "being

In *Stephens v. Railway Officials' & Employees' Accident Ass'n*,[238] the subject insurance policy covered indemnity against two categories of losses:

> First, against those injuries, or death, caused by external, violent, accidental means which leave a visible mark upon the body; and, second, against those injuries, or death, caused by means which leave no visible, external mark upon the body . . . . By this [second] paragraph it is provided that the appellee will pay one-tenth of the face of the policy where "the member shall suffer an injury of which there shall be no visible, external mark on his body sufficient to cause death, and it shall appear by an autopsy that such injury contributed to his death, . . . or if *such injuries or death shall result from the intentional acts of any person other than the insured*, except as the result of quarreling or fighting, whether such other person be sane or insane." It is to be noted carefully that there is no exception in the first category against liability when the body shows the visible, external marks of violent, accidental death, when death is caused by the intentional act of another than the insured. That exception applies alone to the second category, and this second category embraces the distinctive class of injuries, "of which there shall be no visible, external mark on the body."[239]

The insured's employee was killed by the intentional act of someone other than the insured, in such a way that there was a visible, external mark—specifically, his head was "split open."[240] The insurer apparently argued that the insured was entitled to indemnity only in the amount of one-tenth of the face value of the policy, on the ground that the employee's death was covered by the italicized passage above.[241] The Mississippi Supreme Court disagreed, holding that "the words, 'such injuries or death,' preceding the words, 'resulting from the intentional act of another,' . . . under the maxim, 'Noscitur

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associated together, take color from each other").

[238] 21 So. 710 (Miss. 1897).

[239] *Stevens*, 21 So. at 710 (emphasis added).

[240] *Id.* at 711.

[241] *Id.* at 710.

a sociis,' . . . mean injuries or death of the kind with those just before in the same sentence specified . . . that is, injuries or death when no visible, external mark is left on the body."[242] And, therefore, because the employee's death did leave a visible, external mark, it fell within the first category of injury or death—namely, "injuries, or death, caused by external, violent, accidental means which leave a visible mark upon the body."[243]

3. *Ejusdem Generis* (Limit Generalities to Things of the Same Genre as Those Specified)

When an enumeration of specific things is followed by some more general word or phrase, then the general word or phrase will usually be construed to refer only to things of the same general nature or class as those specifically enumerated.[244] However, this rule will yield if its application "would defeat the purpose sought to be accomplished by the use of the words," and "do violence to the manifest intention of the parties as represented by their deed and by their acts and . . . defeat the express purpose which the parties were seeking to accomplish."[245]

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[242] *Id.* at 710-11.

[243] *Id.* at 711.

Noscitur a sociis appears to have been of very limited use to the Mississippi courts in cases involving contract construction—as opposed to statutory construction. *See, e.g.*, State Farm Ins. Co. v. Gay, 526 So. 2d 534, 537 (Miss. 1988); Evans v. City of Jackson, 30 So. 2d 315, 317 (Miss. 1947); Rouse v. Sisson, 199 So. 777, 780 (Miss. 1941). *Stephens* is the only reported case in more than a century to apply the doctrine to a contract, and *Williams* is the only reported decision in that same span to have explicitly considered and rejected the doctrine's application to a contract.

[244] State v. Russell, 187 So. 540, 543 (Miss. 1939); *see, e.g.,* Witherspoon v. Campbell, 69 So. 2d 384, 388 (Miss. 1954) ("[t]he ordinary oil and gas lease refers to the minerals that are to be explored for as being 'oil, gas and other minerals,' and under the doctrine of *ejusdem generis* the words 'and other minerals' have reference to other minerals of like kind and character which are not a part of the soil, such as the oil and gas specifically mentioned."). *See generally* Patterson, *supra* note 3, at 853 ("A general term joined with a specific term will be deemed to include only things that are like (of the same genus as) the specific one. . . . *E.g.*, *S* contracts to sell *B* his farm together with the 'cattle, hogs, and other animals.' This would probably not include *S*'s favorite house-dog, but might include a few sheep that *S* was raising for the market.").

The doctrine of *ejusdem generis* only applies to an ambiguous contract. *See* Yazoo Properties v. Katz & Besthoff No. 284, Inc., 644 So. 2d 429, 432 (Miss. 1994); Cole v. McDonald, 109 So. 2d 628, 637 (Miss. 1959).

In *American Fidelity Fire Insurance Co. v. Hancock*,[246] the collision policy at issue relieved the insurer from liability if the vehicle was subject to a bailment lease, conditional sales contract purchase agreement, mortgage, "or other encumbrance."[247] The truck was, in fact, subject to a lease—but not a bailment lease.[248] The insurer

> admitted in its brief that the lease from Ashley to Automatic Poultry Feeder Company did not constitute a bailment lease . . . .
>
> The appellant then shifted gears and claimed that the said lease from Ashley would constitute an "other encumbrance" not specifically declared and described in the policy and, therefore, the entire policy would be voided. The only encumbrances specifically enumerated before the general term "other encumbrance" is used, are bailment lease, conditional sale, purchase agreement, or mortgage.
>
> Applying the rule of *ejusdem generis* to this contention, the lease from Ashley to Automatic Poultry Feeder Company does not qualify as an "other encumbrance." It is not similar to a sale or mortgage agreement in any respect.[249]

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[245] Singer v. Tatum, 171 So. 2d 134, 144 (Miss.), *cert. denied*, 382 U.S. 845 (1965). The Mississippi Supreme Court has noted that

> [l]ike all other rules of construction, [*ejusdem generis*] is simply an aid invoked by the courts in determining the intent with which words are used and should not be applied when so to do would defeat the purpose sought to be accomplished by the use of the words, the meaning of which is under consideration.
>
> We think that to apply the rule of ejusdem generis to the case at bar would be to do violence to the manifest intention of the parties as well as to defeat the manifest purpose which the parties were seeking to accomplish.

Cole, 109 So. 2d at 636 (quotation omitted).

[246] 186 So. 2d 212 (Miss. 1966).

[247] *American Fidelity*, 186 So. 2d at 217.

[248] *Id.* at 217.

[249] *Id.*

4. *Expressio Unius est Exclusio Alterius*
(Exclude Similar Things Not Specified)

On the other hand, when an enumeration of specific things is not followed by some more general word or phrase, then things of the same kind or species as those specifically enumerated are deemed to be excluded.[250] Thus, for example, "[w]here only one exception is mentioned in a contract, the rule of *expressio unius est exclusio alterius* applies and exceptions not mentioned cannot be engrafted upon it."[251]

In *Gilchrist Tractor Co. v. Stribling*,[252] Stribling argued that he was entitled to continue supplying two of his former customers, Cook Construction and Hyde Construction, because the agreement by which he sold his exclusive franchise to Gilchrist Tractor included a provision that made Stribling "personally responsible for any liability or responsibility of Gilchrist Tractor Company, Inc. or Stribling Bros. Machinery Co., Inc. to Cook Construction Company and Hyde Construction Company growing out of any contracts with either or both of said companies to furnish equipment at less than retail prices . . . ."[253] Applying the rule of *expressio unius est exclusio alterius*, the Mississippi Supreme Court concluded that the only permissible exception to the non-competition agreement was precisely the one (and only one) set forth in the parties' written agreements:

> The provisions of the agreement executed by Stribling prohibit[] him from competing in the sale of Caterpillar equip-

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[250] *See* Stennis v. Board of Supervisors, 98 So. 2d 636, 645 (Miss. 1957) (McGehee, C.J., dissenting) (translating this maxim as "the expression of one thing is the exclusion of another"); *see, e.g.*, Gilchrist Tractor Co. v. Stribling, 192 So. 2d 409, 414-16 (Miss. 1966). *See generally* Patterson, *supra* note 3, at 853-54 ("If one or more specific terms are listed, without any general or inclusive terms, other items although similar in kind are excluded. *E.g.*, *S* contracts to sell *B* his farm together with the 'cattle and hogs on the farm.' This language would be interpreted to exclude the sheep and *S*'s favorite house-dog.").

[251] *Gilchrist Tractor*, 192 So. 2d at 415.

[252] 192 So. 2d 409 (Miss. 1966). For additional discussion of the *Gilchrist* case, *see supra* notes 72-73, 142-43 and accompanying text.

[253] *Gilchrist Tractor*, 192 So. 2d at 414.

> ment in Mississippi for five years . . . .
>
> There is one, and only one, exception to the prohibition. It is stated clearly, in unmistakable terms:
>
>> It is understood that Roger W. Stribling now owns certain machinery and equipment and he may proceed with the orderly liquidation or disposal of said equipment and machinery by either sale or rental purchase agreements.
>
> *This is the only exception, and must be construed as negativing the suggestion that it was intended that there should be others.*
>
> . . . .
>
> If it had been contemplated that Stribling should continue to have the right to supply Cook or Hyde with Caterpillar equipment until these credits were exhausted in the course of writing seven contracts, it would have been easy to say so. The logical assumption is that, if it had been so intended, there would have been some reference to the fact, especially since the retaining of such a right by Stribling is inconsistent with the basic purpose of the main transaction, and would be an exception to the Non-Competition Agreement.[254]

5. *Favor Specific Terms Over General Terms*

If a general provision and a specific provision in the same contract or other instrument conflict or are inconsistent, the specific provision controls or qualifies the meaning of the general.[255] More specific language in a contract is to be given greater weight than general provisions.[256] However, this preference will yield if the parties clearly manifest a contrary intent.[257]

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[254] *Id.* at 415-16 (emphasis added).

As is true with *noscitur a sociis*, *see supra* note 233, this maxim appears to have been of very limited use to the Mississippi courts in cases involving contract—as opposed to statutory—construction. *Stribling* is the only reported case in more than a century to apply the doctrine to a contract.

[255] *See* Estate of Parker v. Dorchak, 673 So. 2d 1379, 1382 (Miss. 1996); Garrett v. Hart, 168 So. 2d 497, 503 (Miss. 1964); Williams v. Batson, 187 So. 236, 239 (Miss. 1939) (en banc); *see e.g.,* Busching v. Griffin, 542 So. 2d 860, 864 (Miss. 1989) ("Neither law nor language leave doubt how we should read an instrument respecting an interest in land when it uses words such as 'five (5) acres, more or less' followed by 'more particularly described' or the like. The 'more particular' description controls, modifying, if not replacing, the 'more or less' language."); *see also* Forbes v. Columbia Pulp & Paper Co., 275 So. 2d 92, 95

In *Camden Fire Insurance Ass'n v. New Buena Vista Hotel Co.*,[258] the court considered an apparent conflict between the terms of a repair clause included in an insurance policy and the terms of a specifically-negotiated rider to the policy:

> [T]he repair clause . . . being a part of the policy itself . . . is subordinate to the provisions of the rider. It is not an exception to the rider, but the rider itself is a specific and controlling provision dealing with a different liability, and prevails over the terms and conditions of the policy. Since the rider is presumed to have expressed the exact agreement of the parties, it controls the policy insofar as it enlarges, modifies or restricts the terms thereof, as it is a specific statement relating to the subject involved . . . . [W]here a rider is attached to printed forms of general use, and is intended to apply most specifically to the condition of the parties named in the policy, the rider has a predominating influence in determining the meaning and intent of the policy . . . . [T]he reason for the rule is that additions to a policy by a rider are actually for the purpose of modifying the general terms of the policy, and therefore, being specific, control the more general terms of the policy.[259]

In *Schlater v. Lee*,[260] the apparent conflict was between two provisions in a will:

(Miss. 1973) ("[W]here there are both general and special provisions in a contract relating to the same thing, the special provisions control."); Carrere v. Johnson, 115 So. 196, 196-97 (Miss. 1928) (recognizing rule that "where property is described in a conveyance in general terms, followed by a specific description by metes and bounds, the latter description will control instead of the former," but finding it inapplicable in the case sub judice). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 203(c) & cmt. e (1981).

[256] *See Dorchak*, 673 So. 2d at 1382.

[257] *See* RESTATEMENT (SECOND) OF CONTRACTS § 203 cmt. e, at 94-95.

[258] 24 So. 2d 848 (Miss. 1946).

[259] *Camden Fire Ins. Ass'n*, 24 So. 2d at 850-51 (citations omitted).

[260] 78 So. 700 (Miss. 1918).

> Item 1. I give, devise, and bequeath to my son, Thomas Blewett [a tract of land described] . . . , together with any all notes and indebtedness that is now due and owing to me from said son Thomas, hereby acquitting and discharging him from the same. This devise to my said son Thomas to be in full of all demands on his part against my estate and to be all he is to receive therefrom, he not to account for the property heretofore given him, but the foregoing in addition thereto.
>
> Item 5. I give, devise and bequeath to my daughter Mary Wooldridge and her heirs during her natural life [terms of gift described]. At her death to be sold and the proceeds to be divided between my heirs share and share about . . . .[261]

Thomas's lawful heirs, argued, *inter alia*, that the provision in item 1 excluding Thomas from sharing in the estate of the testator further than the bequests to him in item 1 conflicted with the provision in item 5 providing for a sale and distribution of the remainder at Mary Wooldridge's death between the heirs of the testator, which would have included Thomas.[262] The court found no irreconcilable conflict:

> [T]he two items are not in conflict, but may be read together and harmonized so as to get the real intent of the testator from the language used in the two items. It is very clear that the testator intended by item 1 to make certain provision for Thomas G. Blewett, Jr., and to expressly exclude him from taking anything further from the estate. At the death of the testator, Thomas G. Blewett, Jr., accepted and took the estate provided for him under item 1 of the will in lieu of any other claim; and he could not accept the bequest in item 1 and also claim an interest as an heir at the death of Mary Wooldridge, life tenant, as provided in item 5. . . . Item 5 of the testator's will here being a general provision, and item 1 being a specific provision, the latter must control and prevail over the former. Therefore we hold that the legatee Thomas G. Blewett, Jr., was by express provision in item 1 excluded from taking

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[261] *Schlater*, 78 So. at 700.

[262] *Id.* at 700-01.

from the estate of the testator under item 5 of the will.[263]

6. *Favor Handwriting to Typing and Typing to Printing*

Except where the parties clearly manifest a contrary intent, handwritten contract provisions are favored when they conflict with or alter typewritten or printed provisions, and typewritten provisions are favored when they conflict with or alter printed provisions.[264] As the Mississippi Supreme Court explained in *Dale v. Case*[265]:

> The reason why greater effect is given to the written than to the printed part of a contract, if they are inconsistent, is that the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed form is intended for general use without reference to particular objects and aims.[266]

In *H&W Industries, Inc. v. Occidental Chemical Corp.*,[267] both the purchase order typed by the plaintiff (H&W) and the purchase acknowledgement form, prepared by the defendant (Occidental) in response to a call from H&W confirming its order, showed that H&W would purchase fifteen hopper cars full of resin from Occidental at a price of $ 0.185 per pound.[268] The back of Occidental's purchase acknowledgement form contained several pre-printed terms, one of which provided that "[p]rices and terms of payment are subject to change without notice and will be those in effect on date of shipment."[269] Occidental was to deliver the carloads in three installments. Between the first and second shipments, the market price of the resin increased unexpectedly, and Occidental notified H&W that subsequent shipments would be at a price in excess of $ 0.185 per pound, citing to the "subject to change" term on the back of the purchase acknowledgement form.[270] The Fifth Circuit affirmed the jury verdict in favor of H&W, despite Occidental's "subject to change" term:

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[263] *Id.* at 701.

[264] *See, e.g.*, Travelers Ins. Co. v. General Refrigeration & Appliance Co., 218 So. 2d 724, 726 (Miss. 1969); *see also* Thornhill v. System Fuels, Inc., 523 So. 2d 983, 988 n.2 (Miss. 1988) (stating that "when the written provisions of a contract cannot be reconciled with the printed provisions, the written provisions control . . . ."); Holifield v. Perkins, 103 So. 2d 433, 434 (Miss. 1958) ("If an instrument's typeset printing cannot be reconciled with provisions which are filled in by the parties, then the filled-in provisions control."). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 203 cmt. f, at 95 (1981) ("It is sometimes said . . . that handwritten terms control typewritten and printed terms, and typewritten control printed.").

[265] 64 So. 2d 344 (Miss. 1953).

[266] *Dale*, 64 So. 2d at 349 (quotation omitted).

[267] 911 F.2d 1118 (5th Cir. 1990).

[268] *H&W Indus.*, 911 F.2d at 1120.

> The district court rejected Occidental's contention that the boilerplate provision created an ambiguity or conflict with the price contained in both parties' purchase orders. The court concluded that "any ambiguity created in this case by the exchange of documents is unilaterally created by the defendant," and refused to give the instruction that the price terms should "drop out" of the contract. We find no error in the district court's assessment.
>
> The typewritten provisions on the purchase order forms and the order acknowledgment form take precedence over the printed boilerplate provisions . . . .[271]

In *Hardie Tynes Foundry & Machine Co. v. Glen Allen Oil Mill*,[272] the Mississippi Supreme Court counseled: "[I]f the written and printed matter can possibly be reconciled, this will be done, it being presumed that the instrument contains no clauses not intended by the parties."[273] *Hardie Tynes* dealt with a contract part of which was printed, part of which was typed, and part of which was handwritten:

> The proposition of the company, accepted by the oil mill May

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[269] *Id.* at 1120 n.2.

[270] *See id.* at 1120-21.

[271] *Id.* at 1122-23.

[272] 36 So. 262 (Miss. 1904).

[273] *Hardie Tynes*, 36 So. at 263 (quotation omitted); *see also* Ford v. Jones, 85 So. 2d 215, 217 (Miss. 1956) ("The rule that the written provisions of a deed control over the printed provisions applies only when the former cannot be reconciled with the latter, and where they are wholly inconsistent.").

> 22, 1902, and thus becoming a contract on its face complete, is on a printed blank, the spaces filled in with writing, and begins thus: "We propose to make and deliver ___ F. O. B. ___ August ___ 1902 ___ unless delayed by strikes, fires or manufacturing contingencies beyond our reasonable control," the engine, etc., describing the subjects of the manufacture . . . . This contract is followed in typewriting by attached specifications of the work to be done, more elaborate than appear in the accepted proposition. At the end of these are typewritten specifications, which are also in the shape of a proposition, and which provide that the oil mill should prepare the foundation, and that the company should furnish a mechanic to erect, if desired, at certain wages, etc., and they conclude thus, in typewriting: "Price and terms to be in accordance with our printed contract herewith attached and made a part of these specifications . . . . Immediately under this we find, in manuscript, this: "It is understood that the above described engine will be shipped August 15th, 1902, failing to do so, Hardie Tynes agrees to pay as forfeit, $5 per day for every day behind this time,. . . .[274]

The court, asked to decide whether the handwritten addendum specifying the shipment deadline and the delay penalty was "independent of and uncontrolled by the reservation as to strikes, etc. in the proposition first signed,"[275] answered "No":

> [T]he original paper was to ship "___ August ___ 1902 ___ unless delayed by strikes," etc., and the written addendum simply fixes a date in August, and provides for damages per diem for delay in shipment; and we think it should be read as providing for the damages in addition to the first proposed contract, and for the exact day of shipment, all subject to the clause "unless delayed by strikes," etc.[276]

Pruitt v. Dean[277] addressed both the rule favoring writing or typing to printing and the exception limiting the rule's application to those instances where the handwritten or typed cannot be reconciled with the printed:

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[274] *Hardie Tynes*, 36 So. at 263.

[275] *Id.*

[276] *Id.*

[277] 21 So. 2d 300 (Miss. 1945).

> While the question is not free from difficulty, we are of the opinion that since it is conceded that printed forms were used for the execution of both deeds of trust, . . . and that this printed provision was modified by the draftsman of such deeds of trust, either with pen and ink or by typewriter, before their execution, by inserting . . . the words "according to law," . . . the parties intended that the words "according to law" in each of said deeds of trust should be substituted for the entire printed provision . . . relating to how the notice of the time, place, and terms of sale should be given; that is to say, that since the quoted provision, as a whole, in the printed form, dealt with the matter of how the sale should be advertised, . . . the parties in modifying such provision by inserting the words "according to law" intended that the sale should be advertised only in the manner then provided by law . . . .
>
> * * *
>
> In so holding, we are not unmindful of the rule that while written (or typewritten) parts of a contract prevail over the printed part, it is nevertheless true that whenever it is possible by any reasonable interpretation, when there is no conflict or inconsistency between the two, they should be reconciled so as to give effect to both. However, we have decided after a careful study of the instruments in question that a reasonable interpretation of them leads only to the conclusion that the inserted typewritten words in reference to how the lands were to be advertised had the effect of superseding the printed provision in regard thereto in its entirety.[278]

7. *Favor Terms Stated Earlier in the Agreement Over Terms Stated Later*

Where two provisions of an instrument cannot be otherwise harmonized, terms stated earlier in an agreement are favored over subsequent terms,[279] with one noteworthy exception: "The latter of two clauses of a will that are in irreconcilable conflict is the latest expression of the intention of the testator or testatrix where there is no other guide, and should prevail . . . ."[280]

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[278] *Pruitt*, 21 So. 2d at 303-04.

[279] *See* Thornhill v. System Fuels, Inc., 523 So. 2d 983, 988 n.2 (Miss. 1988)

("In a deed where there are two repugnant clauses, the first must prevail.").

This seemingly most-secondary-of-all rule will not only yield to any of the primary rules, but to the secondary rules that specific terms control general terms with which they conflict, regardless of the order in which the general and specific terms appear, *see, e.g.*, Schlater v. Lee, 78 So. 700, 701 (Miss. 1918) ("[E]ven though we recognize as a guide the rule that, in case of conflict in the provisions of a will, the last item shall control and annul the first provision, still the rule is that, where there is an inconsistency between two provisions in a will, one a specific and the other a general provision, the specific provision must prevail over the general provision, regardless of the order in which it stands"), and (2) when the written provisions of a contract cannot be reconciled with the printed provisions, the written provisions control, *see, e.g.*, Dale v. Case, 64 So. 2d 344, 349 (Miss. 1953).

[280] Dealy v. Keatts, 128 So. 268, 270 (Miss. 1930).

E. Rules Applicable to Specific Types of Agreements

1. Guaranty Agreements[281]

A guarantor is entitled to a "strict construction," such that its guaranty "may not be extended by construction or implication beyond the precise terms" of the written guaranty.[282] "The person claiming under the guaranty has the burden of showing that the debt whose recovery is sought falls within the contractual terms and that all conditions upon the guarantor's liability have occurred."[283]

That said, if the guaranty is clearly a "continuing guaranty," a court should construe to cover all transactions, including those arising in the future which are within the description or contemplation of the agreement, and to remain in force until revoked by the guarantor.[284] In deciding whether a guaranty is limited or continuing, a court may consider evidence of surrounding circumstances.[285]

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[281] The Mississippi Supreme Court has explained:

> [A] guaranty contract possesses the following characteristics: (1) A guarantor is secondarily liable to the creditor on his contract and his liability is fixed only by the happening of the prescribed conditions at a time after the contract itself is made; (2) the contract of a guarantor is separate and distinct from that of his principal, and his liability arises solely from his own contract, although its accrual depends on the breach or performance of a prior or collateral contract by the principal therein; (3) a guarantor enters into a cumulative collateral engagement, by which he agrees that the principal is able to and will perform a contract which he has made or is about to make, and that if he defaults the guarantor will, on being notified, pay the resulting damages-i.e., a guarantor is an insurer of the ability or solvency of the principal, although this characteristic is not present in an absolute guaranty or a guaranty of payment, but only in a conditional guaranty or a guaranty of collection; and (4) except where the guaranty is absolute, generally the guarantor is entitled to notice of the default of the principal.

Brent v. National Bank of Commerce of Columbus, 258 So. 2d 430, 434 (Miss. 1972).

[282] American Oil Co. v. Estate of Wigley, 169 So. 2d 454, 458 (Miss. 1964).

[283] EAC Credit Corp. v. King, 507 F.2d 1232, 1236 (5th Cir. 1975) (applying Mississippi law).

[284] *See, e.g.*, Ivy v. Grenada Bank, 401 So. 2d 1302, 1302-03 (Miss. 1981); *Brent*, 258 So. 2d at 434-35.

[285] *See* Wingo-Ellett & Crump Shoe Co. v. Naaman, 167 So. 634, 635-36 (Miss.

In *Merchants' & Farmers' Bank v. Calmes*,[286] the guaranty provided:

> Brooksville, Miss., Dec. 6th, 1898. We hereby guaranty the account of Calmes & St. John Co. with the Merchants & Farmers Bank of Macon, Miss., to the amount of $2,500. It is agreed and understood that this guaranty is to cover all amounts which above firm may owe the said Bank to the above specified amount.[287]

The court held the guaranty to be "not a continuing one," but rather "confined to the account as of its date."[288]

By contrast, in *Brent v. National Bank of Commerce of Columbus*,[289] the court found the following to be a continuing guaranty:

> I hereby give this continuing guaranty to the said Bank of Brooksville, Mississippi, hereinafter called "Bank," its transferees or assigns, for the payment in full, together with all interest, attorney fees, other fees, and charges of whatsoever nature and kind, of any indebtedness, direct or contingent whether secured or unsecured, of said debtor to said Bank up to the amount of Sixty Five Thousand and no/100 (65,000.00) Dollars, whether due or to become due, and whether now existing or hereafter arising.[290]

1936) ("[I]n determining whether the guaranty is limited or continuing, that construction should be adopted which best accords with the intention of the parties, as manifested by the terms of the guaranty, in connection with the subject matter and surrounding circumstances, neither enlarging the words beyond their natural import in favor of the creditor nor restricting them in aid of the [guarantor]." (quotation omitted)); *see also Estate of Wigley*, 169 So. 2d at 458 ("[T]he extent of the guarantor's undertaking . . . must be determined . . . from the instrument itself in which it is clearly expressed, or from the instrument and the surrounding circumstances" where it is not clearly expressed.).

[286] 35 So. 161 (Miss. 1903).

[287] *Calmes*, 35 So. at 161.

[288] *Id.* at 162.

[289] 258 So. 2d 430 (Miss. 1972).

[290] *Brent*, 258 So. 2d at 430; *see id.* at 434-35.

2. *Surety Agreements*[291]

As a general rule, courts should construe contracts of surety so as to not expand the surety's obligation beyond that for which it has expressly contracted.[292] A surety's liability is measured by the express terms of its covenant, as contained in the contractual (and statutory) obligations of its principal, and in the surety agreement or bond.[293]

A gratuitous surety is favored by the law, and is entitled to have its undertaking strictly construed in its favor.[294] Gratuitous sureties assume their obligations "without pecuniary remuneration."[295] As such,

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[291] The Mississippi Supreme Court has stated:

> [T]he distinguishable attributes of a contract of suretyship are as follows: (1) A surety is primarily and directly liable to the creditor on his contract from the beginning; (2) the undertaking of a surety is made at the same time and usually jointly with that of his principal, and binds him jointly to the performance of the very contract under which the liability of the principal accrues; (3) the contract of the surety is a direct original agreement with the obligee that the very thing contracted for shall be done-i.e., the surety is an insurer of the debt or obligation; and (4) a surety is held to know every default of his principal and is liable without notice.

Id. at 434.

[292] *See* Alexander v. Fidelity & Cas. Co., 100 So. 2d 347, 349 (Miss. 1958); Metropolitan Cas. Ins. Co. v. Koelling, 57 So. 2d 562, 563 (Miss. 1952).

[293] *Alexander*, 100 So. 2d at 349. In both *Alexander* and *Mississippi Fire Insurance Co. v. Evans*, the issue for the court was whether the defaulting obligor's surety was required to reimburse the obligor's creditors for the attorneys' fees the creditors incurred recovering from the defaulting obligor. Both courts said "no," because neither surety bond provided for the payment of attorneys' fees to parties other than the obligor. *See Alexander*, 100 So. 2d at 349; Mississippi Fire Ins. Co. v. Evans, 120 So. 738, 743-44 (Miss. 1929).

[294] *See Koelling*, 57 So. 2d at 563; National Union Fire Ins. Co. v. Currie, 178 So. 104, 105 (Miss. 1938); W.T. Raleigh Co. v. Rotenberry, 164 So. 5, 5-6 (Miss. 1935). In *Rotenberry*, the gratuitous surety's contract

> ha[d] three essential features: It [wa]s to pay (1) the prior indebtedness of the dealer (2) for any and all goods previously sold to said dealer, and the two foregoing features must be (3) shown by the seller's books. The contract made the seller's books the evidence upon which the liability was to be shown. The contract cannot be extended by construction so as to show the liability, or either of the two required elements of that liability, by any other means than the seller's books. The books must themselves furnish the information required with reasonable certainty without the aid of parol testimony or . . . [writings] kept otherwise than in and as a part of the books themselves.

> [t]heir liability is . . . *strictissimi juris*. They have a right to stand on the terms of their obligation, and, having consented to be bound to a certain extent only, their liability must be found within the terms of that consent, strictly construed.[296]

A compensated surety is not entitled to such preferential treatment; rather, "[w]hile its liability may not be extended beyond the terms of the contract, if the contract is susceptible of two constructions, one of which will uphold and the other defeat the claim, in that event, the construction favorable to the insured will be adopted"[297]:

> [T]he rule of *strictissimi juris* which operates in favor of gratuitous sureties is inapplicable, in a suit against a compensated surety. This merely means, however, that a compensated surety is not entitled to a strict or technical construction of the contract, but that on the contrary the obligation is to be considered in the same light as any other contract, and that the obligation of such a surety should not be extended beyond the scope of his undertaking as deduced from the terms, conditions and circumstances of the instrument. The rule is one of construction, and if there is no ambiguity, the plain intention of the parties cannot be disregarded or enlarged by construction. It is essential not merely that performance of the contract shall operate, but that it must be so intended, for the direct benefit of the third person.[298]

Rotenberry, 164 So. at 6; *see also, e.g.*, Hederman v. Cox, 193 So. 19, 22 (Miss. 1940) (reciting *Rotenberry* and recognizing that gratuitous surety's obligation could not, at common law, "be extended by imposing thereon a new and a different date for performance by the principal to the hurt or possible hurt of the surety—the obligation of the surety must not be extended to any other period of time than is expressed or necessarily included in the contract itself").

[295] *Currie*, 178 So. at 105.

[296] *Id.* (emphasis added).

[297] *Koelling*, 57 So. 2d at 563; *see, e.g.*, New Amsterdam Cas. Co. v. Wood, 57 So. 2d 141, 142 (Miss. 1952) (holding that surety is liable under its bonds for losses to buyers of all stock sold by misrepresentation, even if coverage on its face only applied to preferred stock and that sold was common stock).

[298] Hartford Accident & Indem. Co. v. Hewes, 199 So. 93, 98 (Miss. 1940),

As with a guaranty, a suretyship can be either limited (to one or more specified obligations of the principal) or continuing.[299] A suretyship may also be unlimited or limited with regard to the amount of money the surety may potentially be liable to pay.[300]

3. *Indemnity Agreements*

Agreements that attempt to indemnify a party against its own negligence are "not favorites of the law."[301] Mississippi

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modified on other grounds, 199 So. 772 (Miss. 1941).

In *Koelling*, the court recognized an ambiguity between the terms of the principal's contract and the surety bond:

> In the former, 80% of the contract could be drawn as the work progressed, but the remaining 20% could not be paid until the job was completed. In the latter, while performance in accordance with the contract was required, the obligees might retain as little as 10% at final completion. The only effect of this ambiguity was that the obligees could pay up to 90% as the work progressed. Under the above authorities, the construction favorable to the insured must be adopted, and the 10% provision as to retainage must prevail.

Koelling, 57 So. 2d at 563-64.

[299] *See supra* note 284 and accompanying text.

[300] *See Currie*, 178 So. at 105. In *Currie*,

> [t]he contractual relation between the appellee and appellant was not one of unlimited suretyship. It was unlimited as to duration, but it constituted a continuing guaranty or security, limited as to amount, to wit, the sum of $1,000; and when the surety made good the alleged delinquency of the agent to the full extent of this limited liability, he could not further be held responsible on the bond for other delinquencies occurring during a continuance of the agency.

Id.

[301] Blain v. Sam Finley, Inc., 226 So. 2d 742, 745 (Miss. 1969). Indeed, in some instances, they have been deemed void as contrary to public policy. *See, e.g.*, Entergy Miss., Inc. v. Burdette Cotton Gin Co., 726 So. 2d 1202, 1206 (Miss. 1998) (holding that indemnity clause with regard to utility service provider is void as against public policy).

The willingness of Mississippi courts to uphold clauses excusing a party from the consequences of its own negligence seems to vary depending, at least in part, on the relationship between the parties. For example, anticipatory releases from negligence in contracts between public utilities and their customers

> have traditionally been held void as a matter of public policy "(1) to dis-

courts should enforce such provisions only if they "are made at arm's length without disparity of bargaining power,"[302] and if they express an intent to indemnify against the indemnitee's own negligence in clear and unequivocal terms.[303]

> courage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." Where, as here, the customer has only one choice for an electrical provider, the danger of the utility overreaching through inclusion of an indemnity clause is increased.

Entergy, 726 So. 2d at 1206 (citation omitted) (quoting Bisso v. Inland Waterways Corp., 349 U.S. 85, 90-91 (1955)). As the *Entergy* court explained:

> "It is the general rule that a public utility or common carrier cannot contract against liability for his own negligence, and it may not be doubted that such a tort feasor may not recover under an indemnity agreement which impinges upon this rule." We hold that an indemnity clause in a utility service contract such as the one at issue here intrudes upon the public policy of this State requiring utilities to "exercise the highest degree of care" in constructing and maintaining electrical lines. We cannot allow a utility to contract away its well-established duty of protecting the general public.

Entergy, 726 So. 2d at 1206 (quoting Illinois Cent. R.R. v. Standard Oil Co., 292 F. Supp. 337, 339-40 (S.D. Miss.), *aff'd*, 403 F.2d 1022 (5th Cir. 1968)).

On the other hand, Mississippi courts have upheld indemnity clauses in contracts between a utility and a non-customer. *See, e.g.*, Heritage Cablevision v. New Albany Elec. Power Sys., 646 So. 2d 1305, 1313 (Miss. 1994) (holding that cable company is required to indemnify utility company for latter's negligence pursuant to licensing agreement); *see also, e.g.*, Mississippi Power Co. v. Roubicek, 462 F.2d 412, 417 (5th Cir. 1972); Lorenzen v. South Cent. Bell Tel. Co., 546 F. Supp. 694, 697-98 (S.D. Miss. 1982), *aff'd*, 701 F.2d 408 (5th Cir. 1983). The *Entergy* court explained that the rationale for upholding anticipatory releases in such cases "revolved around the negotiation of two private concerns, unaffected by the greater public policy consideration" present in the relations between a utility and its customers. *Entergy*, 726 So. 2d at 1206.

[302] *Blain*, 226 So. 2d at 745-46.

[303] *Id.* at 746. "[W]hile private contracts of this type are not favorites of the law, they are enforceable provided they are made at arm's length without disparity of bargaining power, and the intent of the parties is manifestly plain and unequivocal." *Id.* at 745-46. Moreover, "[w]hen the contract expressly indemnifies a person against the costs and expenses incident to certain acts, or arising from a certain claim, it extends to the costs and expenses of defending groundless suits," as well as the costs and expenses of suing the indemnitor to make good on the contract of indemnity. *Id.* at 745-46; *see also, e.g.*, Morgan v. United States Fidelity & Guar. Co., 191 So. 2d 917, 923-24 (Miss. 1966) (affirming award of attorneys' fees and expenses incurred by indemnitee in suing to enforce indemnity agreement which clearly and unambiguously provided for indemnitee's

In *Blain v. Sam Finley, Inc.*,[304] Blain agreed to construct a section of highway for the Mississippi State Highway Commission. Blain then sub-contracted with Finley to do a portion of the work called for in Blain's contract with the Commission.[305] Finley's sub-contract with Blain included the following indemnity provisions:

> 8. PROTECTION OF WORK AND INDEMNITY AGAINST NEGLIGENCE:
>
> Subcontractor agrees to . . . so perform the subcontract and subcontract work as to avoid injury or damages to persons or property for which Contractor may be held liable in damages . . . and to fully indemnify and save harmless Contractor from all such claims for damages and from all expenses and attorneys' fees incident thereto, arising out of or in anywise connected with the subcontract work.
>
> 12. INDEMNITY:
>
> . . . . Subcontractor shall also pay all of the expense and cost and attorney's fees incurred by Contractor . . . in the investigation or defense of any action arising out of this subcontract . . . , whether such claim is valid or not, or out of the performance or non-performance of the work hereunder . . . .[306]

Harvey, an employee of Blain, was killed when his car collided with an asphalt spreader belonging to Finley.[307] Harvey's estate sued both Finley and Blain. Thereafter, Blain demanded indemnity and defense from Finley pursuant to the sub-contract, but Finley refused.[308] Blain and Finley ultimately prevailed in the suit by Harvey's estate, and Blain unsuccessfully sued Finley to reimburse Blain for its attorney's fees and expenses incurred in defending the action by Harvey's estate.[309] The supreme court reversed:

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attorneys' fees and expenses).

[304] 226 So. 2d 742 (Miss. 1969).

[305] *Blain*, 226 So. 2d at 743-44.

[306] *Id.* at 744.

[307] *Id.*

[308] *Id.*

[309] *Id.* at 744-45.

> The determinative issue in the case at bar revolves around the interpretation and effect to be given to the indemnity provisions of the subcontract between Blain and Finley . . . . It is clear that section 8 of the indemnity contract in the case at bar is geared to the work and the negligence of the subcontractor. The subcontractor-indemnitor expressly agreed in paragraph 8 of the subcontract "to . . . *save harmless Contractor from all such claims* for damages *and from all expenses and attorneys' fees incident thereto, arising out of or in anywise connected with the subcontract work.*" This language is plain, clear in meaning and free from ambiguity . . . . Although section 12 is for the most part concerned with claims for labor, materials, equipment and similar related items, section 12 is not limited to these items. Section 12 specifically provides: "Subcontractor shall also pay all of the expense and cost and attorney's fees incurred by Contractor . . . *in the investigation or defense of any action arising out of this subcontract or out of the non-payment of any claim of any third party, whether such claim is valid or not, or out of the performance or non-performance of the work hereunder . . . .*"
>
> By construing all of sections 8 and 12 together, the intention of the contracting parties to indemnify the contractor, Blain, against his own negligent acts is clearly and unequivocally shown.[310]

4. Insurance Policies

Mississippi courts strictly construe any ambiguity in an insurance policy against the insurer and in favor of the insured.[311] This is particularly true when the policy provision in question is an exclusion from or limitation on coverage.[312] A risk that "comes naturally within the terms of a policy" should not be construed as falling outside of the policy "unless the intent of the parties to exclude it appears clearly."[313] A condition tending to defeat coverage "must be expressed or so clearly implied that it cannot be misconstrued."[314]

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[310] *Id.* at 746 (emphasis added by the court).

[311] *See, e.g.*, Universal Underwriters Ins. Co. v. Buddy Jones Ford, Lincoln-Mercury, Inc., 734 So. 2d 173, 176 (Miss. 1999); Lewis v. Allstate Ins. Co., 730 So. 2d 65, 68 (Miss. 1998); Burton v. Choctaw County, 730 So. 2d 1, 8 (Miss. 1997); Harrison v. Allstate Ins. Co., 662 So. 2d 1092, 1094 (Miss. 1995); Nationwide Mut. Ins. Co. v. Garriga, 636 So. 2d 658, 662 (Miss. 1994); Home Owners Ins. Co. v. Keith's Breeder Farms, Inc., 227 So. 2d 293, 295 (Miss. 1969); Caldwell v. Hartford Accident & Indem. Co., 160 So. 2d 209, 212-13 (Miss. 1964). Put more bluntly: "If this Court finds an insurance policy ambiguous, we *must necessarily* find in favor of coverage." J&W Foods Corp. v. State Farm Mut. Auto.

In *Jackson v. Daley*,[315] the Mississippi Supreme Court recently considered whether coverage for "injuries resulting from 'ownership, maintenance, or use' of a county automobile" encompassed fatal injuries sustained by a driver whose car flipped after striking a dirt pile left in the road by a county dump truck.[316] The court originally concluded that the accident was not covered by the policy, because the driver's collision with the dirt dumped by the county truck was "too remote"

Ins. Co., 723 So. 2d 550, 552 (Miss. 1998) (emphasis added).

"The basic reason that uncertainty is decided in favor of the insured is that the insurer prepares the policy and should not be allowed by the use of obscure or ambiguous exceptions to defeat the purposes for which the policy was sold." *Buddy Jones Ford*, 734 So. 2d at 177 (citing Evana Plantation, Inc. v. Yorkshire Ins. Co., 58 So. 2d 797, 800 (Miss. 1952); Great Am. Ins. Co. v. Bass, 44 So. 2d 532, 533 (Miss. 1950)); *see also Lewis*, 730 So. 2d at 72 (Banks, J., dissenting) ("Insurance policies are contracts of adhesion and as such ambiguities are to be construed liberally in favor of the insured and against the insurer."); United States Fidelity & Guar. Co. v. Ferguson, 698 So. 2d 77, 80 (Miss. 1997) (holding that, because contracts for insurance are adhesion contracts, courts must protect insureds).

[312] *See, e.g., Buddy Jones Ford*, 734 So. 2d at 177; *Lewis*, 730 So. 2d at 68; *Burton*, 730 So. 2d at 8; *Garriga*, 636 So. 2d at 662; State Farm Mut. Auto. Ins. Co. v. Latham, 249 So. 2d 375, 378 (Miss. 1971); State Farm Mut. Auto. Ins. Co. v. Taylor, 233 So. 2d 805, 810 (Miss. 1970); *Keith's Breeder Farms*, 227 So. 2d at 296; American Hardware Mut. Ins. Co. v. Union Gas Co., 118 So. 2d 334, 335 (Miss. 1960); Griffin v. Maryland Cas. Co., 57 So. 2d 486, 489-90 (Miss. 1952). *See generally* Home Ins. Co. v. Thunderbird, Inc., 338 So. 2d 391, 394 (Miss. 1976) ("In accord with the general standard of giving effect to the purpose of the contract, the rule is that provisos, exceptions, or exemptions, and words of limitation in the nature of an exception, are strictly construed against the insurer, where they are of uncertain import or reasonably susceptible of a double construction." (quoting 2 GEORGE J. COUCH, COUCH ON INSURANCE § 15:92 (2d ed. 1959)).

[313] *Home Insurance*, 338 So. 2d at 394 (quoting 2 COUCH, *supra* note 313, § 15:93).

[314] *Id.* (quoting 2 COUCH, *supra* note 313, § 15:93).

[315] 739 So. 2d 1031 (Miss. 1999) (en banc).

[316] *See Jackson*, 739 So. 2d at 10-41.

to constitute an "injur[y] resulting from . . . use of a county automobile."[317] On rehearing, the court reversed course. Following the earlier decision of *Merchants Co. v. Hartford Accident & Indemnity Co.*,[318] wherein the court found the insurer liable for injuries sustained by a driver whose car collided with large poles that had been left on the highway after their use was required to remove the insured's vehicle from a ditch,[319] the *Jackson* court, on rehearing, found coverage.[320]

In *Cox v. Peerless Life Insurance Co.*,[321] the policy covered, *inter alia*, "accidental bodily injury sustained while driving or riding within any automobile, truck or bus . . . , provided such bodily injuries are caused solely *by reason of an automobile, truck or bus accident.*"[322] The insured was knocked to the floor of a bus by another passenger while the bus was stopped at a station in order to load and unload passengers.[323] The insurer argued that the insured's injuries were not covered because she was not injured "as a result of an accident *to* the bus."[324] The court disagreed:

> We do not think that the term "bus accident" in the policy should be restricted to a casualty to the bus itself. Certainly this does not accord with common understanding of that phrase. We think that within the meaning of the phrase "bus accident" is the unusual, undesigned, and unexpected occurrence of insured's fellow passenger accidentally colliding with insured in the bus and causing injuries. [The insurer's] suggested interpretation would be a very narrow construction of the policy, and would not accord, we think, with the usual and common understanding of the phrase "bus accident."[325]

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[317] *See* Jackson v. Daley, No. 96-CA-00642-SCT, 1998 WL 800123, at *10 (Miss. Nov. 19, 1998), *withdrawn and superseded on rehearing*, 739 So. 2d 1031 (Miss. 1999) (en banc).

[318] 188 So. 571 (Miss. 1939).

[319] *Merchants Co.*, 188 So. at 571-71.

[320] *Jackson*, 739 So. 2d, at 1141-42.

[321] 135 So. 2d 411 (Miss. 1961).

[322] *Cox*, 135 So. 2d at 411 (emphasis added).

[323] *Id.*

[324] *Id.* at 412 (emphasis added).

[325] *Id.* at 413. This author is hard pressed to think of spilling coffee on his lap

At issue in *Universal Underwriters Insurance Co. v. Buddy Jones Ford, Lincoln-Mercury, Inc.*,[326] was whether the $10,000 limitation on liability for "employee dishonesty" was cumulative with regard to several acts of embezzlement by a single employee or whether each act of embezzlement was subject to a separate limitation on liability:[327]

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while driving as an "automobile accident"; and, therefore, is not too sure about the court's description of the "usual and common understanding of the phrase 'bus accident.'"

[326] 734 So. 2d 173 (Miss. 1999).

[327] *Universal Underwriters*, 734 So. 2d at 176. The policies contained the following provisions relating to the type of loss covered and the maximum amount of liability or limits for loss were set forth in the policies as follows:

> EMPLOYEE DISHONESTY–WE will pay for LOSS of MONEY, SECURITIES, and other property which YOU sustain resulting directly from any fraudulent or dishonest act committed by an EMPLOYEE with manifest intent to:
>
> (a) cause YOU to sustain such a LOSS, and;
>
> (b) obtain financial benefit for the EMPLOYEE, or any other person or organization intended by the EMPLOYEE to receive such benefit other than salaries, commissions, fees, bonuses, promotions, awards, profit sharing, pensions, and other EMPLOYEE benefits earned in the normal course of employment.
>
> * * *
>
> 9. THE MOST WE WILL PAY–LOSS payment will not reduce OUR liability for other LOSSES. From the amount of LOSS, WE will deduct the net amount of all recoveries obtained or made by YOU (other than LOSS covered by any other bond or insurance) or US. If the net LOSS is in excess of the deductible stated in the declarations, and regardless of the number of persons or organizations included in YOU, the most WE will pay:
>
> (a) under EMPLOYEE DISHONESTY, is the limit stated in the declarations as applicable to a LOSS caused by one or more EMPLOYEES, or to all LOSS caused by one EMPLOYEE or in which the EMPLOYEE is concerned or implicated;
>
> * * *
>
> Regardless of the number of years this Coverage Part continues in force, the limit stated in the declarations is not cumulative from one period to another, or from one year to another.

The policies also contained a discovery requirement and conditions for coverage for employee dishonesty in the policies which read as follows:

> 1. DISCOVERY–LOSS is covered only if discovered not later than one

> Patsy Ellis embezzled a total amount of $233,082.97 from Jones Ford. Universal argues that the policy language is unambiguous, and clearly states that the $10,000 limit of liability and the $250 deductible in the declarations for "Employee Dishonesty" apply to "all LOSS caused by one EMPLOYEE or in which the EMPLOYEE is concerned or implicated." Thus, Universal argues that the limit of liability and deductible apply to the total amount of loss caused by Ellis, rather than to each of the 175 separate occasions of embezzlement in which she engaged.
>
> .... The Insuring Agreement, in turn, defines "loss," for the purpose of employee dishonesty, to mean "LOSS of MONEY . . . which YOU sustain resulting directly from any fraudulent or dishonest act committed by an EMPLOYEE with manifest intent to: (a) cause YOU to sustain such a LOSS; and (b) obtain financial benefit for the EMPLOYEE." Jones Ford maintains, therefore, that the limitations clause plainly and unambiguously applies to all loss resulting directly from each fraudulent or dishonest act committed by an employee. It argues that "[i]f Universal had wished to have the Limitation clause apply to the entire loss caused by all the acts of embezzlement by an employee, Universal simply could have defined 'loss' in the Insuring Agreement as loss of money resulting directly from any fraudulent act, or series of related fraudulent or dishonest acts, committed by an employee."[328]

The Mississippi Supreme Court affirmed the chancery court's finding that the "employee dishonesty" provision was ambiguous and, construing the ambiguity against the insurer (Universal), held that each act of embezzlement was separately covered up to $10,000.[329]

In *Lewis v. Allstate Insurance Co.*,[330] the policy in question excluded from coverage "bodily injury or property damage resulting from [a]n act or omission intended or expected to

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year from the end of the Coverage Part period.

Id. at 175.

[328] *Id.* at 176 (alteration in original).

[329] *See Id.* at 177-78.

[330] 730 So. 2d 65 (Miss. 1998).

cause bodily injury or property damage . . . . [e]ven if the bodily injury or property damage is of a different kind or degree, or is sustained by a different person or property, than that intended or expected."[331] The insured (Thompson), along with two other persons, went to the residence of one Maury Richardson, planning to set it afire with molotov cocktails.[332] Thompson alleged that he believed the residence to be unoccupied at the time, and that their intent was to destroy Richardson's property, not to cause bodily injury.[333] Unknown to Thompson and his cohorts, Donnell Bowie was sleeping upstairs in Richardson's house when it caught fire.[334] Bowie died of smoke inhalation, and Thompson and his cohorts were arrested and charged with Bowie's murder.[335]

Thompson's parents sought defense under their homeowner's policy[336] against the civil action that followed. Allstate tendered a defense under reservation of rights, and sued for a declaratory judgment that coverage was excluded due to the "intentional acts" exclusion quoted above.[337] The trial court granted summary judgment in favor of Allstate.[338] Bowie's survivors appealed, arguing that the intentional acts exclusion did not apply because Thompson did not intend to cause bodily harm.[339] A divided Mississippi Supreme Court affirmed:

> Lewis argues that the policy in this case should be read to exclude coverage for bodily injury resulting from an act or omission intended or expected to cause bodily injury and to exclude coverage for property damage resulting from an act or omission intended or expected to cause property damage. However, according to Lewis, the exclusionary provision does

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[331] *Lewis*, 730 So. 2d at 68 (emphasis omitted).

[332] *Id.* at 67.

[333] *Id.*

[334] *Id.*

[335] *Id.*

[336] *Id.*

[337] *Id.* at 67-68.

[338] *Id.* at 68.

[339] *Id.*

> not apply to a claim for bodily injury that results from an act intended or expected to cause only property damage. We disagree with Lewis's construction . . . .
>
> . . . .
>
> [T]he policy, as written, only requires that the insured intended or expected property damage which resulted in property damage or bodily injury for the exclusionary clause to apply. Normally, Allstate would have to show that Thompson intended the property damage, or expected that property damage was substantially certain as a result of his actions. However, Thompson's admission (and Lewis's assent to that admission) that he intended to, or at least expected that the actions by Green and Wilson would, cause property damage, satisfies Allstate's burden and is sufficient to invoke the exclusion. Because of the language of the policy, Thompson's intent regarding bodily injury is irrelevant. Accordingly, since the question of intent of the insured is settled, summary judgment was proper.[340]

In *Harrison v. Allstate Insurance Co.*,[341] the court balanced a facially unambiguous policy provision that precluded

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[340] *Id.* at 68, 72. Justices Banks and Sullivan disagreed:

> Here the problem is the disjunctive nature of the exclusionary provision. The explanatory "even if" . . . in the policy language should have been expanded to say that the exclusion applies even if property damage was intended and bodily injury resulted and vice versa if indeed that was what was meant as Allstate now contends. But because it was not, the policy exclusion could reasonably be interpreted as having more than one meaning.
>
> The Lewis' interpretation is that it applies where property damage is intended even if the property damage is of a different kind or degree or sustained by different property and it applies similarly where bodily injury is intended and the bodily injury is of a different kind or to a different person than intended. It follows, in their view, that it does not apply where, as here, property damage was intended and bodily injury occurred.
>
> The Lewis' interpretation of the exclusionary clause is just as reasonable as that asserted by Allstate. In light of the fact that the policy is subject to more then one interpretation it is ambiguous and should have been construed in favor of the insureds.

Id. at 72-73 (Banks, J., dissenting, joined by Sullivan, P.J.) (footnote omitted).

[341] 662 So. 2d 1092 (Miss. 1995).

"stacking" of uninsured motorist coverage against the fact that the insurer included in the premium for the no-stacking policy an additional charge for the insured's second car.[342] The insured, Dudley Harrison, who was involved in an accident with an uninsured motorist on May 17, 1991,

> was insured under an Allstate automobile policy which insured two vehicles. Prior to amendments, the policy provided uninsured motorist coverage of $10,000 per person and $20,000 per accident for each occurrence. Allstate charged a premium of $22.50 for the first car and each additional car thereafter. Thus, an insured would be charged $45 for stacking two vehicles. In 1989, Allstate added Endorsement AU1865-1 to its policies which prohibits stacking. Allstate also amended its billing structure to charge a single premium of $52.40 for uninsured motorist coverage under a policy listing two or more vehicles (hereinafter referred to as the multi-car rate), and charged $28.40 for a policy listing only one vehicle (hereinafter referred to as the single car rate) . . . . As the result of Harrison's accident, Allstate tendered a check for uninsured motorist benefits to him in the amount of $10,000 and paid $1,000 for applicable medical payments coverage. Allstate, however, denied Harrison's claim for an additional $10,000 in uninsured motorist benefits.[343]

The Mississippi Supreme Court found Harrison's argument "well taken":

> [A]n insurer's attempt to preclude stacking is ineffective . . . where the policy language clearly precludes stacking but the declaration sheet charges separate uninsured motorist premiums thereby rendering the policy, as a whole, ambiguous.

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[342] *Harrison*, 662 So. 2d at 1093. The court explained:

> "Stacking" refers to the practice of allowing an insured to add or "stack" the limits of each vehicle covered under an insurance policy to pay for damages sustained in an accident. For example, if the insured obtained a policy providing $10,000 in uninsured motorist coverage for bodily injury on two vehicles, the maximum recovery would be $20,000 ($10,000 plus $10,000).

Id. at 1093 n.1.

[343] *Id.* at 1093 (footnote omitted).

> Where separate premiums are paid, the presumption arises in favor of aggregation of uninsured motorist coverage, notwithstanding clear and unambiguous language to the contrary.
>
> . . . .
>
> Although the policy language precluding stacking is clear, we find that Harrison was actually charged separate premiums for his two vehicles under the guise of one lump sum on his declaration sheet. Because the premium for two cars is $24 more than the premium for one car, Allstate clearly charges an additional premium for the second car.[344]

If an insurance policy covers only items contained within or located at a particular structure or location, "the temporary removal of property from its usual place of storage for cleaning or repairing will not affect the coverage while the property is thus temporarily away from its designated location."[345]

In *Keith's Breeder Farms*, the policy covered the contents of "Poultry House No. 1."[346] At the time of the loss, the nests and other items that normally resided in Poultry House No. 1 had been temporarily removed in order to clean the building.[347] The court found that, given the "long-standing" custom of the poultry business to periodically remove the nests and thoroughly clean the buildings that ordinarily house them,

> [i]t would be a strained and tortuous construction indeed if for two or three weeks of each year while the nests were outside purely and simply for cleaning, scrubbing and disinfecting [the building] there would be no coverage, but that immediately when this necessary periodical cleaning was completed and the nests were moved back inside the poultry house, that the coverage would be automatically reinstated. In our

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[344] *Id.* at 1094 (citations omitted); *see* Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1381 (Miss. 1977); *see also* Government Employees Ins. Co. v. Brown, 446 So. 2d 1002, 1006 (Miss. 1984) (finding policy ambiguous both because of excess premium charged for additional vehicles and because "no-stacking" language in policy conflicted with declaration sheet providing separate UM coverage for three vehicles and charging separate premiums for three vehicles).

[345] Home Owners Ins. Co. v. Keith's Breeder Farms, Inc., 227 So. 2d 293, 296 (Miss. 1969).

[346] *Keith's Breeder Farms*, 227 So. 2d at 294.

[347] *Id.*

> opinion, neither the insurer nor the insured intended for this to be the case.[348]

As the court explained elsewhere:

> [T]he statement that property is in, or contained in, a particular house, is not a promissory stipulation or warranty that the property will remain there at all times during the life of the policy, but is used merely to identify the particular property insured.[349]

If the provisions of an insurance policy conflict with a relevant statute, the statute controls and its terms are incorporated into the policy.[350]

In *Atlanta Casualty Co. v. Payne*,[351] the court considered the effect of the Mississippi Uninsured Motorists Act[352] on the uninsured motorist coverage in the insured's policy:

> Although the Paynes do not contend that the language of the exclusionary provision was ambiguous, the record indicates that they did not have a sufficient understanding of the ramifications of its language to make an informed partial rejection or waiver of uninsured motorist coverage when they signed the exclusion agreement. We believe that it is . . . logical . . . to place the burden of proof on the insurer to show that such an exclusion or any other quasi-rejection of uninsured motorist insurance was a knowing and informed decision.
>
> This Court has consistently viewed any attempts by insurance companies to contract away the protections afforded

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[348] *Keith's Breeder Farms*, 227 So. 2d at 295; *see also* Boyd v. Mississippi Home Ins. Co., 21 So. 708, 708-09 (Miss. 1897) (refusing to construe casualty policy as covering only ginned cotton after it had been removed from ginning house and stored in cotton house when cotton in question was destroyed while in ginning house and ready to be moved to cotton house, because such construction would be "technical, to the last degree" and contrary to common knowledge and custom or persons dealing with cotton farming and ginning trades).

[349] *Boyd*, 21 So. at 709.

[350] *See* Dunnam v. State Farm Mut. Auto. Ins. Co., 366 So. 2d 668, 670 (Miss. 1979).

[351] 603 So. 2d 343 (Miss. 1992).

[352] MISS. CODE ANN. § 83-11-101(1) *et seq.* (Supp. 1998).

> to injured insureds by the Uninsured Motorists Act as invalid. The humanitarian purposes of the statute have been furthered by decisions made from the perspective of the injured insured, enabling the same recovery which would have been possible had the injury been caused by a financially responsible motorist.[353]

All that said, insurance policies are contracts,[354] and their construction and interpretation "is according to the same rules which govern other contracts."[355] Therefore, when the words

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[353] *Payne*, 603 So. 2d at 348-49 (citations and parenthetical omitted).

[354] Sessoms v. Allstate Ins. Co., 634 So. 2d 516, 519 (Miss. 1994); *see* Cauthen v. National Bankers Life Ins. Co., 88 So. 2d 103, 104 (Miss. 1956).

[355] Krebs v. Strange, 419 So. 2d 178, 181 (Miss. 1982); *see, e.g.*, J&W Foods Corp. v. State Farm Mut. Auto. Ins. Co., 723 So. 2d 550, 552 (Miss. 1998) ("Initially, in interpreting an insurance policy, this Court should look at the policy as a whole, consider all relevant portions together and, whenever possible, give operative effect to every provision in order to reach a reasonable overall result."). *See generally* Murriel v. Alfa Ins. Co., 697 So. 2d 370, 371 (Miss. 1997) ("[T]he relationship between an insurance company and its insured is controlled by the nature of the contract, and the respective duties of the parties are specifically stated by the provisions of the insurance policy.").

As the Mississippi Supreme Court posited long ago:

> What is a policy of insurance? It is the instrument setting forth the contract of insurance. It is the evidence of the agreement between the insurer and the insured. Its purpose is to show the considerations, the terms, the contract of indemnity, the privileges, the benefits, and the conditions. The usual rules for construing contracts should be applied in considering contracts of insurance. The controlling purpose in the construction of all contracts should be to find the intention of the parties. To this end it is necessary to inspect the whole instrument. It will not do to limit the consideration to one part of a writing, isolated from the other parts. The true intention can only be gathered from all of the words, all of the clauses, and all that may be shown by the entire paper.

Penn Mut. Life Ins. Co. v. Gordon, 61 So. 311, 311 (Miss. 1913).

At issue in the recent case of *Hare v. State*, was whether the clear and unambiguous terms of an insurance policy could "trump" the equitable right of subrogation. Hare v. State, 733 So. 2d 277, 282 (Miss. 1999). Reviewing cases from a number of jurisdictions, as well as earlier related decisions of its own, the Mississippi Supreme Court answered "no," thus carving out an exception to "plain meaning" construction of unambiguous insurance policies:

> [U]nder Mississippi law two different types of subrogation exist: (1) equitable subrogation, arising from operation of law, and

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> (2) conventional subrogation, arising from contract. *Union Mortgage, Banking & Trust Co. v. Peters*, 18 So. 497 (Miss. 1895); *St. Paul Prop. & Liability Ins. Co. v. Nance*, 577 So. 2d 1238, 1240 (Miss. 1991). In *Peters*, this court distinguished between the two as follows:
>
> > The principle of equitable subrogation does not arise from contract (for that is conventional subrogation), but is a creation of the court of equity, and is applied in the absence of an agreement between the parties, when otherwise there would be a manifest failure of justice.
>
> *Peters*, 18 So. at 500. Similarly, the *Nance* court noted that subrogation had equitable origins but that it could now arise in statutory or contractual contexts. *Nance*, 577 So. 2d at 1240.
>
> The State asserts that the case *sub judice* is obviously one of conventional subrogation, and the bottomline issue is then whether the subrogation clause is sufficiently clear and broad to entitle the insurer to recover despite the "made whole" rule.

Hare, 733 So. 2d at 281-82. The "made whole" rule

> is the general principle that an insurer is not entitled to equitable subrogation until the insured has been fully compensated. Most other jurisdictions follow the "made whole" rule in its broadest terms. Some courts adopting the rule have explained that the rule is most consistent with principles of equity and justice upon which the doctrine of subrogation is based. One court has reasoned that "where either the insurer or the insured must to some extent go unpaid, the loss should be borne by the insurer for that is a risk the insured has paid it to assume."

Id. at 281 (citations and parentheticals omitted) (quoting Garrity v. Rural Mut. Ins. Co., 253 N.W.2d 512, 514 (Wis. 1977)). Furthermore,

> [m]any of those jurisdictions following the "made whole" rule allow the rule to be overridden by provisions in an insurance contract, as the State asks this Court to do in the case sub judice.
>
> The core issue is then whether Mississippi should follow the Arkansas approach . . . or the Ohio approach . . . . In *Hrenko*, the Supreme Court of Ohio held that the subrogation clause at issue was of the conventional sort, and thus, by its clear language, it applied. . . .
>
> In *Franklin*, the Supreme Court of Arkansas . . . . held that "the equitable nature of subrogation requires that no distinction need be made between equitable and conventional rights of subrogation."
>
> * * *
>
> Franklin incurred over $124,000 in medical expenses, and Healthsource paid only $71,120.65 of those bills. Before the issue of double recovery could arise, Franklin would have to recover in excess of $50,000 to be "made whole" for his medical expenses alone which does not even consider the amount of additional damages Franklin incurred that have been valued at over $400,000. Therefore, the Arkansas Supreme Court found that Franklin could not have enjoyed a double recovery.

of an insurance policy are "plain and unambiguous," a Mississippi court should "afford them their plain, ordinary meaning and . . . apply them as written,"[356] as long as doing so is not contrary to law or public policy.[357]

> Here both parties cannot be "made whole." Hare endured pain and suffering in nasal surgery and now has a permanent facial scar. The State . . . only paid $6,056.50 in medical expenses out of a total $8,667.50. Hare's expert witnesses by affidavit stated a potential recovery of between $50,000.00 and $175,000.00. Thus, the $10,000.00 recovered by Hare cannot possibly be said to have "made him whole" or to have been a double recovery.
>
> . . . .
>
> [T]his Court adopts the "made whole" rule and holds that it is not to be overridden by contract language, because the intent of subrogation is to prevent a double recovery by the insured, especially here as expressly stated in the State Health Plan. Until the insured has been fully compensated, there cannot be a double recovery. Otherwise, to allow the literal language of an insurance contract to destroy an insured's equitable right to subrogation ignores the fact that this type of contract is realistically a unilateral contract of insurance and overlooks the insured's total lack of bargaining power in negotiating the terms of these types of agreements.

Id. at 282-84 (citations omitted) (discussing, *inter alia,* Blue Cross & Blue Shield Mut. of Ohio v. Hrenko, 647 N.E.2d 1358 (Ohio 1995); Franklin v. Healthsource of Ark., 942 S.W.2d 837 (Ark. 1997)).

[356] Lewis v. Allstate Ins. Co., 730 So. 2d 65, 68 (Miss. 1998); *accord* Jackson v. Daley, 739 So. 2d 1031, 1041 (Miss. 1999) (en banc). *See* Lowery v. Guaranty Bank & Trust Co., 592 So. 2d 79, 82 (Miss. 1991); Overstreet v. Allstate Ins. Co., 474 So. 2d 572, 575 (Miss. 1985); Paul Revere Life Ins. Co. v. Prince, 375 So. 2d 417, 418 (Miss. 1979); Insurance Co. of N. Am. v. Deposit Guar. Nat'l Bank, 258 So. 2d 798, 801 (Miss. 1972). As the Mississippi Supreme Court has explained:

> Rules of construction are useful only where the language used is ambiguous or unclear. . . . No rule of construction requires or permits the Court . . . to enlarge an insurance company's obligations where the provisions of its policy are clear.

State Auto. Mut. Ins. Co. v. Glover, 176 So. 2d 256, 258 (Miss. 1965). *But see* Boyd v. Mississippi Home Ins. Co., 21 So. 708, 708-09 (Miss. 1897) ("[Insurance] policies must always be construed with reference to the nature and kind of property insured, the uses to which it is ordinarily, within the common knowledge of men, put, and custom of the country in dealing with it, and the parties to such contracts must be held to have all this in view in making the contract.").

[357] The Mississippi Supreme Court has recognized an exception to the "plain meaning" rule when the plain meaning of the policy is contrary to law or public policy. *See supra* note 116; *see, e.g.*, Nationwide Mut. Ins. Co. v. Garriga, 636 So. 2d 658, 662-65 (Miss. 1994) (holding that "reduction clause" for workers' com-

Any rider attached to an insurance policy is "part and parcel" of the policy and the two must be construed together.[358] Likewise, the application attached to or giving rise to an insurance policy is a part of the insurance contract, and the policy should be construed together with the application.[359] Where the terms of the application and policy conflict, the terms of the policy will ordinarily govern, unless the conflict is due to a clerical error in the policy, mutual mistake, fraud, or the like.[360]

5. *Settlement Agreements*

Mississippi law "favors" agreements made to settle disputes and, generally speaking, Mississippi courts will enforce a settlement agreement between the parties "absent any fraud, mistake, or overreaching."[361] An enforceable settlement agreement is a contract between the settling parties, and will be construed and interpreted accordingly.[362]

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pensation benefits, while not ambiguous, was unenforceable as "contrary to public policy").

[358] Germania Life Ins. Co. v. Bouldin, 56 So. 609, 614 (Miss. 1911).

[359] *See* Interstate Life & Accident Ins. Co. v. Flanagan, 284 So. 2d 33, 35 (Miss. 1973).

[360] *See id.* at 37.

[361] McManus v. Howard, 569 So. 2d 1213, 1215 (Miss. 1990); *see, e.g.*, Hines v. Hambrick, 49 So. 2d 690, 693-95 (Miss. 1951); *see also* McBride v. Chevron U.S.A., 673 So. 2d 372, 379 (Miss. 1996) ("Our law favors settlement for many reasons, not the least of which includes the expeditious closure of cases.").

The Mississippi Supreme Court:

> [we are] thoroughly committed to the doctrine that, where money is paid with a recital that it is in full settlement of all demands, or of all accounts, or similar wording, when it is accepted, it is full settlement therefor, although there might be, in fact, more due than the recital in the check or warrant showed.

State Hwy. Dep't v. Duckworth, 172 So. 148, 150 (Miss. 1937); *see, e.g.*, Colonial Life & Accident Ins. Co. v. Cook, 374 So. 2d 1288, 1290 (Miss. 1979); Blue Ribbon Creamery v. Monk, 147 So. 329, 330 (Miss. 1933); A. Greener & Sons v. P.W. Cain & Sons, 101 So. 859, 859-60 (Miss. 1924).

[362] *See, e.g.*, Holland v. Mayfield, No. 96-CA-01169-SCT, 1999 WL 353023, at *4 (Miss. June 3, 1999); Taylor v. Firestone Tire & Rubber Co., 519 So. 2d 436, 437-38 (Miss. 1988); *Hines*, 49 So. 2d at 693-94.

For example, *Warwick v. Gautier Utility District*[363] considered whether a release and settlement agreement resolving a chancery court proceeding brought by Warwick alleging an unlawful taking of some of his property also, contrary to Warwick's intention and understanding, settled his otherwise unrelated claim pending in circuit court for breach of contract.[364] The court held that it did not:

> Warwick argues that the Release and Settlement Agreement refers only to the claims and issues connected with the specific cause of action in Jackson County Chancery Court which involved the taking of certain property of Warwick's in which he held a reversionary interest and not to all causes of action that may exist between the parties. Specifically, Warwick argues that the chancery court cause of action did not concern or decide any claim or issue related directly or indirectly to the 1970 Agreement which Warwick sought to have enforced in the circuit court matter. Thus, he argues that Gautier Utility District is not released from liability under the terms of the 1970 Agreement. We agree.
>
> The Release and Settlement Agreement specifically states as follows:
>
> > That Charles E. Warwick, being an adult resident citizen above the age of twenty-one (21), for the consideration of Ninety Thousand and No/100 Dollars ($90,000.00), to him in hand paid, including cash and other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, does hereby release and forever discharge Gautier Utility District and United States Fidelity and Guaranty Company, their agents, servants, employees, successors, assigns, executors, administrators, and all other persons, firms and/or corporations, except as specified herein, of and from any and all claims of any kind or nature growing out of or in any way connected with the taking of the undersigned's property which is in dispute in the lawsuit known as Charles E. Warwick v. Gautier Utility District

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[363] 738 So. 2d 212 (Miss. 1999).

[364] *Warwick*, 738 So. 2d at 213.

> filed in the Chancery Court of Jackson County, Mississippi, bearing Cause No. 58,113.
>
> The Release and Settlement Agreement clearly did not apply to the action for breach of contract pending in circuit court. Although the agreement does state that it releases Gautier Utility District "from any and all claims of any kind or nature growing out of or in any way connected with the taking of the undersigned's property which is in dispute in the lawsuit known as Charles E. Warwick v. Gautier Utility District filed in the Chancery Court of Jackson County, Mississippi, bearing Cause No. 58,113," a fair and complete reading of the agreement reveals that the intent of the parties was to extinguish all claims regarding the taking of the real property only. The release of "any and all claims" clearly refers to claims arising from the taking of the property. Irrespective of the taking, the separate claim for breach of contract still stands. Both parties to the chancery court lawsuit were aware of the lawsuit pending in circuit court, yet in the agreement they limited the release and settlement agreement to the "lawsuit known as Charles E. Warwick v. Gautier Utility District filed in the Chancery Court of Jackson County, Mississippi, bearing Cause No. 58,113." While the agreement specifically addressed the claim involving the taking of property, the breach of contract claim pertaining to the dispute over utility charges was never mentioned in the Release and Settlement Agreement. It is clear through examination of the words incorporated in the Release and Settlement Agreement that the parties did not intend a release or settlement of the breach of contract claim pending in Circuit Court.[365]

6. *Releases*

Mississippi courts subject releases to "rigid scrutiny" and will not enforce a release unless it is "fairly and honestly negotiated and understandingly entered into."[366] Mississippi courts will not uphold a release "if any element of fraud, deceit, oppression, or unconscionable advantage is connected with the transaction."[367] Nor should a Mississippi court construe a release to extend to anyone not a party to the release[368] or to any claim not mentioned therein,[369] absent some manifestation of the releasing party's intent that its release be so construed.

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[365] *Id.* at 215-16.

[366] Farragut v. Massey, 612 So. 2d 325, 330 (Miss. 1992) (quotation omitted); *accord* Quinn v. Mississippi State Univ., 720 So. 2d 843, 851 (Miss. 1998).

In *Country Club of Jackson, Mississippi, Inc. v. Saucier*,[370] the plaintiff, Saucier, was injured while riding in a vehicle driven by Stevens, who was killed in the accident. Saucier made a claim against Stevens' estate and his insurer, who paid Saucier $30,000, "[b]y way of settlement and release, dated March 14, 1984."[371] Saucier then sued the Country Club, alleging "dram shop" liability. The Country Club argued that Saucier's March 14, 1984 release extinguished any claim she might have against the Country Club.[372] The chancery court disagreed, and the supreme court affirmed:

> The appellant Country Club contends that it is a third party beneficiary of the release between the guest passenger

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[367] Kansas City, Memphis & Birmingham Ry. v. Chiles, 38 So. 498, 499 (Miss. 1905).

[368] *See* Weldon v. Lehmann, 84 So. 2d 796, 797 (Miss. 1956) ("In order for a release of one joint tort-feasor to have the effect of releasing the other joint tort-feasor, the satisfaction received by the injured party must be intended to be and must be accepted as full compensation for the damages sustained."); *accord* Holland v. Mayfield, No. 96-CA-01169-SCT, 1999 WL 353023, at *4 (Miss. June 3, 1999); Smith v. Falke, 474 So. 2d 1044, 1045 (Miss. 1985); *see also* Country Club of Jackson, Miss., Inc. v. Saucier, 498 So. 2d 337, 339-40 (Miss. 1986) ("[A]n injured party executing a release incident to a settlement with one tortfeasor releases others by whom or on whose behalf no considerations have been given only where the intent to release the others is manifest.").

"Extrinsic evidence must be considered in determining whether a settlement agreement was intended to release a person who was not a party to the agreement." *Holland*, 1999 WL 353023, at *4; *see, e.g., Falke*, 474 So. 2d at 1046.

[369] *See, e.g.,* Smith v. First Federal Sav. & Loan Ass'n of Grenada, 460 So. 2d 786, 787 (Miss. 1984) (holding that "where there is no language in the release agreement which could fairly be construed to render it a general release, the unmentioned personal secured transactions remained viable after execution of the release and may be enforced by the secured according to their tenor").

[370] 498 So. 2d 337 (Miss. 1986).

[371] *Saucier*, 498 So. 2d at 338.

[372] *Id.*

> and the driver's estate and is a member of a specified class discharged under the general release language: "All other persons, firms, organizations, or corporations . . ."
>
> Recently in *Smith v. Falke*, 474 So. 2d 1044 (Miss. 1985) this Court . . . . held that the language of the release discharging a codefendant and "all others whatsoever" could not be construed to release another codefendant absent a manifest intent to do so.
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> * * *
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> . . . In this case the Court in a finding of fact determined that the parties did not intend that The Country Club benefit from the release. It is also clear that appellant was a stranger to the release contract and paid no consideration for it, nor was consideration paid for its benefit. . . .
>
> [A]n injured party executing a release incident to a settlement with one tortfeasor releases others by whom or on whose behalf no considerations have been given only where the intent to release the others is manifest. No such intent appears here.[373]

In passing on the validity of a release, "all surrounding conditions should be fully developed, and the relative attitudes of the contracting parties clearly shown."[374] In *Kansas City, Memphis & Birmingham Railway Co. v. Chiles*,[375] the court pulled no punches regarding the significance of the evidence regarding surrounding circumstances or the validity of the subject release:

> The bare statement of the circumstances attendant upon the procuring of the release in the instant case is more than sufficient to demonstrate that there was an utter absence of that good faith and full understanding of legal rights which are indispensable to the validity of such releases. . . . [T]he action of the court in admitting the correspondence which had passed between counsel for appellee and the officials of appellant was clearly correct. This proof made clearly visible the secret springs moving the officials of the claims department,

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[373] *Id.* at 338-40 (citations omitted).

[374] Farragut v. Massey, 612 So. 2d 325, 331 (Miss. 1992).

[375] 38 So. 498 (Miss. 1905).

> and tended to throw light upon some of the details of the iniquitous scheme by which an ignorant, suffering, and impecunious man, by proffer of financial relief from present distress, joined with vague and misleading suggestions of future benefits and favors, was tricked into bartering away substantial rights for a grossly inadequate consideration, by signing papers the contents of which, according to his testimony, which is strongly corroborated by the circumstances in evidence, were deliberately and designedly misrepresented.[376]

Mississippi courts should not permit a party to use an "anticipatory release" as a means to escape liability for its own tortious acts[377]—particularly when those acts clearly "exceed the scope of the [activities] contemplated in the release."[378]

7. *Arbitration Agreements*

Mississippi courts should construe arbitration agreements liberally "so as to encourage the settlement of disputes and the prevention of litigation," and should indulge "every reasonable presumption . . . in favor of the validity of arbitration proceedings."[379]

In *IP Timberlands Operating Co., Ltd. v. Denmiss*

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[376] *Chiles*, 38 So. at 499. In *Farragut*, the court likewise found that the combination of ambiguous language and surrounding circumstances contraindicated the trial court's summary judgment for the drafter of the release, Massey, and his co-party, Barnett. *Farragut*, 612 So. 2d at 330.

[377] *Farragut*, 612 So. 2d at 330; *see, e.g.*, L & A Contracting Co. v. Hube, 133 So. 2d 394, 395-96 (Miss. 1961) (holding that release in right-of-way deed did not extend to excuse "wilful or grossly negligent damage to the surface of and timber on grantors' adjacent property" caused by installation of culvert by subcontractor of grantee); Yazoo & Miss. Valley R.R. v. Smith, 43 So. 611, 611-12 (Miss. 1907) (refusing to construe release from liability for damage arising out of construction and operation of railroad tracks to cover flooding due to necessity of elevating grade on streets at some future date to facilitate pedestrian and vehicular traffic crossing railroad tracks).

[378] *Farragut*, 612 So. 2d at 331. See *supra* subpart II.E.3 for more discussion of "anticipatory releases" (*i.e.*, indemnity agreements).

[379] Hutto v. Jordan, 36 So. 2d 809, 812 (Miss. 1948); *accord* IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 103, 106 (Miss. 1998); Herrin v. Milton M. Stewart, Inc., 558 So. 2d 863, 864-65 (Miss. 1990); Craig v. Barber, 524 So. 2d 974, 977 (Miss. 1988).

Corp.,[380] the Mississippi Supreme Court resolved two conflicting lines of authority, by holding that it "will respect the right of an individual or an entity to agree in advance of a dispute to arbitration or other alternative dispute resolution."[381]

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[380] 726 So. 2d 96 (Miss. 1998).

[381] *IP Timberlands Operating Co.*, 726 So. 2d at 104. *IP Timberlands* involved an apparently frequent area of uncertainty in arbitration agreements—to wit, does "arbitration" mean arbitration, or does it mean appraisal? *Id.* at 98. The trial court found that, as a matter of law, "arbitration" did mean appraisal. *Id.* The Mississippi Supreme Court disagreed:

> The purchase option expressly stated that the price was to be fixed by three arbitrators, not appraisal. Denmiss contends that the term "arbitrators" unambiguously contemplated appraisal, however, the purchase option is not necessarily ambiguous. Although, the analysis for an ordinary contract may end at the plain wording expressed, this Court has discussed the difficulty in determining if the parties' agreement actually contemplated arbitration instead of appraisal. . . .
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> . . . .
>
> In what may be the best single source to derive intent, the 1945 agreement provided for the use of arbitrators in one other instance. Under the lease agreement, Kraft paid $1,000,000 on the day of the agreement and was obligated to make another payment to complete the transaction. Kraft had the option of paying a flat $1,250,000 to make complete consideration, or Kraft could elect to pay an amount that was to be based upon the amount of timber on the leased lands. To arrive at the total under the second option, the parties stipulated in the agreement to a set price for different types of lumber (for example, Kraft would pay $1.50 per one thousand feet of pine pulpwood, $7 per one thousand feet of hardwood sawtimber, etc.) that would be multiplied by the amount of timber estimated by a timber cruise. The agreement provided that the firm of Pomeroy & McGowin Estimators were to make an estimate of the timber upon the lands. However, if Pomeroy could not perform the estimate, then the parties were to each choose one arbitrator, and the two arbitrators were to agree on the third arbitrator. If the two arbitrators could not agree upon the third arbitrator, then the parties were to ask a U.S. District Court Judge of Mississippi to choose the third arbitrator. These three arbitrators were to select another firm of estimators.
>
> Under this provision of the agreement, the use of the term "arbitrators" cannot be reconciled with the use of "appraisers." Although, arbitrators often are not limited to such a narrow decision as choosing another firm of timber estimators, the selection of an impartial and fair firm of estimators would be important to both Denkmann and Kraft. Thus, use of the term arbitrators in this provision more closely reflects that the parties did, in fact, contemplate arbitrators. These parties would not have chosen appraisers to choose an estimator. Denmiss admits that

8. *Choice of Law Agreements*

Mississippi courts

> will give effect to an express agreement that the laws of a specified jurisdiction shall govern, particularly where some material element of the contract has a real relation to, or connection with, such jurisdiction. The intention of the parties as to the law governing the validity, construction and effect of a property settlement or separation agreement will be respected in the absence of anything violating the public policy of the forum jurisdiction.[382]

By so doing, "the law by which a contract is to be governed is that which parties intended or may fairly be presumed to have intended."[383] However, while Mississippi courts will defer to the substantive law of another jurisdiction chosen by the parties, Mississippi procedural and remedial law will still govern the enforcement of the contract.[384]

> appraisers only engage in setting a value.
>
> As stated earlier, the plain language of the purchase option provided for the price to be fixed by three arbitrators. Both Denkmann and Kraft were knowledgeable and experienced timberland companies, if they had intended any meaning other than arbitrators, they could have easily substituted such term.
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> * * *
>
> This Court finds, as a matter of law, that the term "arbitrators" as used in the purchase option does unambiguously mean arbitrators. This Court has long held that, "Articles of agreement to arbitrate, and awards thereon are to be liberally construed so as to encourage the settlement of disputes and the prevention of litigation, and every reasonable presumption will be indulged in favor of the validity of arbitration proceedings."

Id. at 104-06 (quoting *Hutto*, 36 So. 2d at 812) (citations omitted).

[382] Miller v. Fannin, 481 So. 2d 261, 262 (Miss. 1985); *accord* Cox v. Howard, Weil, Laboussie, Friedrichs, Inc., 619 So. 2d 908, 911 (Miss. 1993); *see, e.g.*, Crowe v. Smith, 603 So. 2d 301, 307-08 (Miss. 1992).

[383] *Cox*, 619 So. 2d at 911.

[384] *Id.* at 911-12.

9. *Liquidated Damages / Penalty Provisions*

Mississippi courts will enforce a liquidated damages provision if the contractual damages are "reasonable and proper in the light of the circumstances of the case."[385] On the other hand, Mississippi courts will not enforce contractual damages if the amount provided is "not a reasonable pre-estimate of damages" or "constitute[s] a penalty."[386]

To determine whether a particular provision is a permissible liquidated damages clause or an impermissible penalty, the terminology used by the parties is not controlling.[387] Rather, Mississippi courts "must look to the parties' intentions,"[388] and must consider the difficulty in determining the actual damages that might result from a breach.[389] Where damages for breach are both "uncertain and difficult of estimation," the Mississippi Supreme Court seems more inclined to construe such clauses as permissible liquidated damages provisions.[390]

In *Board of Trustees v. Johnson*,[391] for example, the Board

> entered into a contract with Johnson, agreeing to lend him $24,000 for expenses . . . . The contract required Johnson to practice [family practice, internal medicine, or pediatrics] for

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[385] Maxey v. Glindmeyer, 379 So. 2d 297, 301 (Miss. 1980); *accord* Board of Trustees of State Insts. of Higher Learning v. Johnson, 507 So. 2d 887, 889-90 (Miss. 1987).

[386] *Johnson*, 507 So. 2d at 890; *see* Wood Naval Stores Export Ass'n v. Latimer, 71 So. 2d 425, 430 (Miss. 1954); Chicago Inv. Co. of Miss. v. Hardtner, 148 So. 214, 217 (Miss. 1933); Shields v. Early, 95 So. 839, 841 (Miss. 1923); *see, e.g.*, *Maxey*, 379 So. 2d at 301 (finding that forfeiture of $75,000 deposit was inequitable because property survey determined that there was less acreage than represented, and that proper remedy was, at most, judgment for vendor's actual damages).

[387] *See Latimer*, 71 So. 2d at 430; *Shields*, 95 So. at 841.

[388] *Johnson*, 507 So. 2d at 890; *see* Continental Turpentine & Rosin Co. v. Gulf Naval Stores Co., 142 So. 2d 200, 209 (Miss. 1962); Jones v. Mississippi Farms Co., 76 So. 880, 884 (Miss. 1917).

[389] *See Johnson*, 507 So. 2d at 890; Brown v. Staple Cotton Coop. Ass'n, 96 So. 849, 856-57 (Miss. 1923).

[390] *Johnson*, 507 So. 2d at 890. *See, e.g.*, *Latimer*, 71 So. 2d at 431; *Brown*, 96 So. at 856.

[391] 507 So. 2d 887 (Miss. 1987).

> five years in a community of 7,500 population, since changed to 10,000 population, or less. It also provided that Johnson was to repay the loan at six percent interest, and upon breach of its terms, to pay an additional $5,000 "per year for each year remaining to be served" for liquidated damages.[392]

Johnson breached, and the Board sued, seeking $24,000 in unpaid principal, $25,000 in liquidated damages, and $9,187.50 in interest, for a total of $58,187.50. Johnson sought, and was granted, summary judgment.[393] The Board appealed, and Johnson argued, *inter alia*, that the "liquidated damages" provision in the contract was, in fact, an impermissible penalty. The supreme court disagreed:

> [T]he loss arising from Johnson's refusal to engage in family practice, internal medicine, or pediatrics, is difficult to assess; consequently, the parties rightly agreed to include a liquidated damages provision in their contract. Moreover, such damages are reasonable, since their amount varies with the time remaining under the contract, thereby more accurately reflecting the Board's losses. Indeed, since Johnson agreed not only to repay the loan but also to practice one of the listed specialties, the mere return of principal with interest does not offer the State complete restitution for the loss of his services.[394]

10. Grants of Real Property or Other Property Rights

a. Deeds and Related Documents

As a general rule, "where parcels of real estate are conveyed by well-known designations, such conveyances are valid, though resort to extrinsic evidence may be necessary to show what was accurately included in the general description employed in the conveyance."[395]

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[392] *Johnson*, 507 So. 2d at 888.

[393] *Id.*

[394] *Id.* at 890.

[395] Kyle v. Rhodes, 15 So. 40, 40 (Miss. 1894); *accord* Jones v. Hickson, 37 So. 2d 625, 627-28 (Miss. 1948).

In *Raines v. Baird*,[396] Baird agreed to sell Raines "that tract of land adjoining section Nine, and known as the Phil Allen place, containing eighty acres more or less" for $800.00, to be paid over five years and secured by a deed of trust against the property until fully paid.[397] Baird "alleged that the contract was void because of a patent ambiguity in the description of the property sold."[398] But, on cross-examination, Baird accurately described the land in question:

> The place was called the Phil Allen place because occupied by a [person] named Phil Allen. A proper description of the land is as follows: It is in the N. E. 1/4 of section seventeen, township seventeen, range four west, and is that part of the N. E. 1/4 which is east of a cypress brake dividing the quarter, and most of the land is in the N. 1/2 of said quarter; being all the N. E. 1/4 east of the brake.[399]

Applying the rule of *Kyle v. Rhodes*[400] that, where the writing "describes the premises by reference to extraneous facts, . . . it is proper to resort to extrinsic evidence to ascertain those facts, in order to show what was embraced in the general designations of the land which was employed by the grantor,"[401] the *Raines* court concluded that "resort to the extrinsic evidence referred to in the contract determined with definiteness and certainty the premises intended to be conveyed";[402] and, therefore, that "[t]here is no patent ambiguity on the face of the contract of sale sued on herein."[403]

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[396] 37 So. 458 (Miss. 1904).

[397] *Raines*, 37 So. at 458.

[398] *Id.*

[399] *Id.*

[400] 15 So. 40 (Miss. 1894).

[401] *Kyle*, 15 So. at 40; *accord* Jones v. Hickson, 37 So. 2d 625, 628 (Miss. 1948); *see also* Tucker v. Field, 51 Miss. 191, 194 (1875) ("If the meaning of the instrument, by itself, is affected with uncertainty, the intention of the parties may be ascertained by extrinsic testimony. Where subject of a devise was described by reference to some extrinsic fact, it was not merely competent but necessary to admit extrinsic evidence to ascertain the fact, and through that medium, to ascertain the subject of devise." (citation omitted)). *See generally* Holliman v. Charles L. Cherry & Assocs., Inc., 569 So. 2d 1139, 1144 (Miss. 1990) ("[W]here, as here, land is described by township, range and section, so that it may be located with absolute certainty, it is of no importance whatsoever to the validity of the conveyance that the lands or a portion thereof are recited as lying in an incorrect county."); Cole v. Cole, 54 So. 953, 954 (Miss. 1911) ("[I]f the description contained in the writing points to specific property, parol evidence is admissible to identify it, because that is certain which is capable of being made

Ordinarily Mississippi courts construe deeds of conveyance most strongly against the grantor.[404] However, if the grantee prepared the documents of conveyance, the presumption against the grantor may be relaxed, and the deed construed according to rules of construction and interpretation applying to contracts in general.[405]

For example, in *Baker v. Columbia Gulf Transmission Co.*,[406] the Bakers, "Grantors," sued Columbia Gulf, "Grantee," for damage to their property resulting from Columbia Gulf's construction of a natural gas pipeline across their property. The court's attention focused on the following provisions in the parties' right-of-way agreement:

> 2. By the terms of this agreement, Grantee has the right to lay, construct, maintain, operate, alter, repair, remove, change the size of, and replace at any time or from time to time one or more additional lines of pipe and appurtenances thereto, said additional lines not to necessarily parallel any existing line laid under the terms of this agreement. Provided however, that for each additional line laid after the first line is laid hereunder, Grantee shall pay Grantor, his heirs or assigns, One Dollar ($1.00) per lineal rod of additional pipe line laid under, upon, over or through said hereinabove de-

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certain.").

[402] *Raines*, 37 So. at 458.

[403] *Id.*

[404] *See* Deason v. Cox, 527 So. 2d 624, 626-27 (Miss. 1988); Brashier v. Toney, 514 So. 2d 329, 332 (Miss. 1987); Baker v. Columbia Gulf Transmission Co., 218 So. 2d 39, 41 (Miss. 1969); Fatherree v. McCormick, 24 So. 2d 724, 725 (Miss. 1946); Yazoo & Miss. Valley R.R. v. Lakeview Traction Co., 56 So. 393, 395 (Miss. 1911). MISS. CODE ANN. § 89-1-5 (1991), which permits transferring a fee simple without using any of the "magic words" once required by common law, does not change the presumption against the grantor. *Deason*, 527 So. 2d at 626.

[405] *See, e.g.*, Clark v. Carter, 351 So. 2d 1333, 1335-36 (Miss. 1977); *Baker*, 218 So. 2d at 41; Hamilton v. Transcontinental Gas Pipe Line Corp., 110 So. 2d 612, 613 (Miss. 1959).

[406] 218 So. 2d 39 (Miss. 1969).

> scribed property.
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> . . . .
>
> 4. Grantee hereby agrees to bury the pipe line to a sufficient depth so as not to interfere with cultivation of the soil and agrees to pay for any damage to growing crops and fences which may arise from the construction, maintenance and operation of said lines. Said damage, if not mutually agreed upon, shall be ascertained and determined by three disinterested persons . . . . The written award of such three persons shall be final and conclusive.
>
> . . . .
>
> 6. It is understood and agreed that the sum of ____ Dollars per rod as damages in full will be paid to the Grantors herein by the Grantee herein before the said pipe line is laid and the Grantors herein hereby agree that said sum of ____ Dollars per rod will be accepted by said Grantors as full and complete settlement for any and all damages (real or alleged) occasioned by the construction of said pipe line on and across the above described land.[407]

Columbia Gulf argued that the right-of-way agreement between itself and the Bakers limited the Bakers' damages to $1 per lineal rod foot, as provided for in paragraph two of the agreement.[408] The Bakers argued that paragraph six, not paragraph two, controlled.[409] Implicitly applying the rules that the contract must be read as a whole,[410] and that every word or provision should be given meaning and effect,[411] the Mississippi Supreme Court reversed the circuit court's judgment in favor of Columbia Gulf:

> Paragraph 2 gives Columbia the right to maintain, repair and change the size of pipes and to lay one or more additional lines upon payment of $1.00 per lineal rod of additional pipe laid. Nothing has been said thus far concerning damages occasioned by construction, maintenance or operation. . . . In

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[407] *Baker*, 218 So. 2d at 39.

[408] *Id.* at 40-41.

[409] *Id.*

[410] *See supra* subpart II.C.2.

[411] *See supra* subpart II.C.3.

> paragraph 4 . . . the grantee agrees (1) to bury the pipe lines a sufficient depth so as not to interfere with cultivation of the soil and (2) to pay for any damages to growing crops and fences which may arise from the construction, maintenance or operation of the lines. . . . While construction is mentioned, it is our opinion the parties intended for the provisions regarding damages in paragraph 4 to apply primarily to damages arising from maintenance and operation after construction. Paragraph 6 is by its terms concerned with "all damages" occasioned, not by maintenance or operation, but solely from "construction." . . . The presence of this paragraph shows that the parties intended that the grantor would be paid for "all damages" occasioned by the "construction." This is a different category from the damages to growing crops and fences arising from maintenance and operation as provided in paragraph 4. The "all damages" occasioned by "construction" could not apply to damages to growing crops and fences arising out of "maintenance and operation" although "all damages" referred to in paragraph 6 could include damages to growing crops and fences occasioned by "construction." The right to construct additional pipe lines extends to the indefinite future and damages occasioned thereby would probably extend beyond growing crops and fences. In our opinion this accounts for the attempt to provide for an agreement concerning "all damages" from construction. Otherwise there would have been no reason to add paragraph 6.
>
> . . . [P]aragraph 6, when considered with the other provisions of the agreement, expresses an intention that grantor would be paid for all damages occasioned by construction and that the parties did not agree on the amount. . . .[412]

A deed and mortgage executed contemporaneously between or among the same parties should be construed together,[413] as should a deed and a "contemporaneous and kindred" instrument creating a trust,[414] and a deed and a plat which includes the property granted.[415]

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[412] *Baker*, 218 So. 2d at 42.

[413] *See* Clark v. Carter, 351 So. 2d 1333, 1335 (Miss. 1977).

[414] *See* Doe v. Bernard, 15 Miss. 319, 323 (1846).

[415] *See* Duane v. Saltaformaggio, 455 So. 2d 753, 757 (Miss. 1984) ("The

b. *Deed vs. Mortgage*

Mississippi courts presume that a deed conveys possession to the grantee.[416] Nonetheless, "a deed absolute on its face may be found valid and effectual as a mortgage, if it were intended by the parties 'to operate as a security for the repayment of money.'"[417] In determining whether a transaction was intended as a mortgage, rather than a deed, "there is no conclusive test"; rather, "each case must be decided upon its own facts and all the surrounding circumstances."[418] The party seeking to prove that a purported deed was merely a mortgage bears the burden of proof by clear and convincing evidence.[419]

This burden may be met by proving, *inter alia*, that the grantor has "retained and exercised after the transaction the same control over the land as he did before the transaction took place."[420]

For example, in *Sweet v. Luster*,[421] the decedent (Sweet) borrowed $1,100 from his uncle (Luster), in exchange for which Sweet conveyed to Luster Sweet's one-fourth undivided interest in 289 acres of real property. Upon Sweet's death, his heirs

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parties' deeds incorporate the official plat to particularly describe the lot conveyed. Therefore, all the descriptive information in the plat should be considered and harmonized as far as possible to achieve the intent of the grantor."). *But see* Gilich v. Mississippi State Highway Comm'n, 574 So. 2d 8, 12 (Miss. 1990) ("Descriptions in the original plat and other deeds are not considered as evidence of intent, as intent is discerned from the four corners of the deed. These are considered only if the description in the deed is ambiguous and unclear. To look to these descriptions or other outside evidence makes the deed, when clear and unambiguous, of no value.").

[416] *See* Sweet v. Luster, 513 So. 2d 1240, 1241 (Miss. 1987); Bethea v. Mullins, 85 So. 2d 452, 456 (Miss. 1956).

[417] Harris v. Kemp, 451 So. 2d 1362, 1364 (Miss. 1984) (quoting Vasser v. Vasser, 23 Miss. 378, 380 (1852)).

[418] *Harris*, 451 So. 2d at 1365; *see* Lampley v. Pertuit, 199 So. 2d 452, 455 (Miss. 1967); Emmons v. Emmons, 64 So. 2d 753, 755 (Miss. 1953).

[419] *See Sweet*, 513 So. 2d at 1241; *Harris*, 451 So. 2d at 1364-65; Delancey v. Davis, 91 So. 2d 286, 288 (Miss. 1956); *Bethea*, 85 So. 2d at 456; *see also* Conner v. Conner, 119 So. 2d 240, 256 (Miss. 1960); Jordan v. Jordan, 111 So. 102, 103-04 (Miss. 1927).

[420] *Emmons*, 64 So. 2d at 755; *accord Sweet*, 513 So. 2d at 1241-42; *see also Bethea*, 85 So. 2d at 457.

[421] 513 So. 2d 1240 (1987).

attempted to have the deed set aside, arguing that it was merely a mortgage to secure the loan.[422] The Mississippi Supreme Court held that the chancellor erred in finding that the deed was a conveyance, rather than a mortgage, because "there was uncontradicted evidence that Sweet had retained and exercised the same control over the land both before and after the deed's execution."[423] The court also noted that

> Luster stated not only to his loan officer and son, but also at trial that the deed was a debt-securing mortgage . . . . Moreover, Luster's comment, "Dennis, you don't owe the bank, you just owe me," is wholly at odds with his present claim that title vested in him no later than when Sweet failed to pay the loan's principal in February, 1978.
>
> Equally significant, the deed at issue stands as one of several transactions, where individuals secured loans after they had executed deeds to Luster. Upon repayment, Luster would reconvey the property. In this instance, Luster endorsed a note for $1,100.00, receiving in return a deed to property valued at as much as $24,500.00.
>
> Finally, there was testimony that Sweet had continued to express an ownership interest until the time of his death, speaking to his children about the land and timber.[424]

The Mississippi Supreme Court has also considered the relation of the parties, the financial condition of the grantor, possession by the grantor, the value of the property, the conduct of the parties, the payment of taxes, and the subsequent dealings of the parties, as pertinent to deciding whether a particular grant was a deed or a mortgage.[425]

Thus, for example, in *Harris v. Kemp*,[426] the court found that a purported deed was, in fact, a mortgage, based on the circumstances surrounding the transaction:

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[422] *Sweet*, 513 So. 2d at 1241.

[423] *Id.* at 1242.

[424] *Id.* at 1242.

[425] *See* Harris v. Kemp, 451 So. 2d 1362, 1365 (Miss. 1984); *Emmons*, 64 So. 2d at 755.

[426] 451 So. 2d 1362 (Miss. 1984).

> The financial condition of the grantor (Harris) was extremely poor and he was attempting, with Kemp's help, to stave off foreclosure. Also Harris, the grantor, remained in possession and control of the property after the execution of the deed. The value of the property, however, was only slightly higher than the total amount Kemp had invested, though as noted below Harris remained obligated to repay these amounts. And finally, the conduct of the parties showed that Kemp acted to help Harris save his property and took a special warranty deed and assignment of the Wesson Milling Company deed of trust only to protect his interest by placing himself above the judgment creditors. Moreover, and perhaps more importantly, the evidence here showed that Kemp merely took an assignment of the $50,000 Wesson Milling Company deed of trust. The testimony indicated that this assignment did not cut off the indebtedness and that it has not been cancelled. Indeed, on August 21, 1979, Kemp renewed the Wesson Milling Company note. Also the evidence showed $18,600 in promissory notes executed by Harris in favor of Kemp and still outstanding. Thus all the evidence, including the testimony of Kemp himself, indicates that a debtor-creditor relationship continues to exist and that the existing debt by Harris was not extinguished by the giving of the special warranty deed.[427]

c. *Deed vs. Will*

If an instrument, though in the form of a deed, "makes no present conveyance of an interest in land or otherwise directs that the interest to be conveyed vests in the grantee only upon the death of the grantor, such an instrument is regarded as testamentary in character" and Mississippi courts will construe and enforce it as a will, not a deed.[428] On the other hand, if the instrument "conveys a future interest in land which vests in the grantee effective upon delivery of the deed, though reserving in the grantor a life estate, the effect of which is to postpone only the grantee's right of possession or occupancy," Mississippi courts will construe and enforce the instrument as a deed.[429]

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[427] *Harris*, 451 So. 2d at 1365.

[428] Ford v. Hegwood, 485 So. 2d 1044, 1045 (Miss. 1986); *see also* Tapley v. McManus, 168 So. 51, 52 (Miss. 1936).

In *Ford v. Hegwood*,[430] the instrument at issue provided in relevant part, "[W]e, the undersigned . . . do hereby sell, convey and warrant to our son, . . . at OUR DEATH, the following described land . . . ."[431] The Mississippi Supreme Court saw this case as falling in between *Tapley* and *Buchanan*,[432] and construed the conveyance as a deed, rather than a will, as follows:

> Here the words used leave no reasonable doubt but that J.O. Hegwood and Nannie Mae Hegwood intended to convey the land as of June 20, 1951, so that there would be no question of its ownership at their death. Lawyers may find interesting the subtle distinction between a conveyance in the present of a future interest with a life estate reserved, on the one hand, and, on the other, a conveyance to vest at death and irrevocable only at death—and, as noted above, our law recognizes it. We are confident that laymen would n[ot] understand such a distinction, much less have it in mind at the time of the drafting of an instrument such as that in question. Doubtful cases will not turn on such subtleties.
>
> The words of the instrument communicate to the reader a dominant intention on the part of the Hegwoods that at their death their property belong to their son and his heirs. . . .
>
> . . . The object of persons such as the Hegwoods being one which our law allows to be accomplished, we regard it as a sound rule of construction to resolve doubts in favor of treating the instrument as a deed rather than a will. Put otherwise, an instrument such as that under consideration here appearing in the form of a deed should be adjudicated testamentary in character . . . only where such affirmatively and clearly appears from the language of the instrument.[433]

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[429] *Ford*, 485 So. 2d at 1045; *see also* Buchanan v. Buchanan, 112 So. 2d 224, 226-27 (Miss. 1959).

[430] 485 So. 2d 1044 (Miss. 1986).

[431] *Ford*, 485 So. 2d at 1045.

[432] *Id.* at 1046; *see also supra* notes 428-29.

[433] *Id.* at 1046-47 (footnote and citations omitted). In so ruling, the court disre-

d. Reservations of Rights

A valid reservation in or exception to a conveyance must contain words "as definite as those required to convey title."[434] Everything "not unequivocally and specifically reserved" is deemed to be "conveyed by the granting clause."[435] The reservation must "describe the interest reserved with certainty,"[436] must be "of some portion of the granted premises, which, without the reservation, would be conveyed by the deed,"[437] and must "necessarily be of something which belongs to the grantor at and before the execution of the deed."[438]

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garded both parties' invitations to treat the instrument as ambiguous and construe it in light of extrinsic evidence, opting to "adjudicate its meaning solely by reference to its language and the intention and purposes there revealed." *Id.* at 1047.

[434] Peoples Bank & Trust Co. v. Nettleton Fox Hunting & Fishing Ass'n, 672 So. 2d 1235, 1237 (Miss. 1996); Texas Co. v. Newton Naval Stores Co., 78 So. 2d 751, 753 (Miss. 1955); Richardson v. Marqueze, 59 Miss. 80, 94 (1881).

[435] Thornhill v. System Fuels, Inc., 523 So. 2d 983, 989 (Miss. 1988); *accord Peoples Bank*, 672 So. 2d at 1237; Bedford v. Kravis, 622 So. 2d 291, 294 (Miss. 1993).

[436] *Peoples Bank*, 672 So. 2d at 1237; *see also* Federal Land Bank of New Orleans v. Cooper, 200 So. 729, 730-31 (Miss. 1941).

[437] Barataria Canning Co. v. Ott, 37 So. 121, 124 (Miss. 1904).

[438] *Barataria Canning Co.*, 37 So. at 125. Property or rights excluded from a grant because they are not owned by the grantor at the time of the grant are more properly termed "exceptions" rather than "reservations." *See* Fatherree v. McCormick, 24 So. 2d 724, 725 (Miss. 1946). As the *Fatherree* court explained:

> [A] reservation operates by way of a re-grant by the grantee to the grantor of the estate or interest reserved.
>
> By this test the grantor could not be said to have reserved one-half of the minerals for he owned only one-eighth. If by a reservation the grantee be viewed as re-conveying to the grantor such one-half, the latter would receive back more than he had. We remind ourselves again that the grantor warranted only the undivided interest which he had yet he did not except therefrom one-half of such interest but one-half of "all mineral rights." This exception is consistent with the description of the extent of his undivided interest and inconsistent with a reservation of an undivided one-eighth interest. To give the exception any other character it would have to be so amended or otherwise by simple and clear expression enlarged to indicate that there is a reservation of one-half of the minerals owned by the grantor.

Fatherree, 24 So. 2d at 725 (citations omitted).

In *Peoples Bank & Trust Co. v. Nettleton Fox Hunting & Fishing Ass'n*,[439] the purported reservation of mineral rights read: "Oil and Mineral rights have been leased before we came into possession of property title is not herein conveyed."[440] Because the conveyance "fail[ed] to describe the interest being reserved with certainty,"[441] the court concluded that the plain language of the deed was "of little help,"[442] and that it must resort to the rule of *contra proferentem*,[443] whereby ambiguities are construed against the party who drafted the ambiguous provision.[444]

In *Barataria Canning Co. v. Ott*,[445] the seller of certain real property (appellee) attempted to reserve "littoral and aquatic rights" over oyster beds, planted by the appellant adjacent to the appellee's property, and the oysters therein.[446] The court held that the reservation was unenforceable because it attempted to reserve something which did not belong to the reserving party:

> The attempted reservation in the deed . . . [can] in no wise affect the rights of appellant to the oysters which it had bedded and planted, and in which a right of property had been lawfully granted it. . . . Property cannot be conveyed by reservation, and yet that is what is attempted to be done if the construction contended for by appellee be sustained. At the date of the deed appellee owned the land and the water front with all littoral and aquatic rights lawfully appurtenant thereto. Appellant owned the oysters which it had planted and bedded in the waters in front of the land. By deeding a portion of the land and reserving certain rights which are merely incident to the land, appellees claim to have acquired title to the property of appellant. This view cannot be sustained. Appellant, being the owner of the oyster beds which it had planted, can-

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[439] 672 So. 2d 1235 (Miss. 1996).

[440] *Peoples Bank & Trust Co.*, 672 So. 2d at 1237.

[441] *Id.*

[442] *Id.*

[443] *See supra* subpart II.D.1.

[444] *See Peoples Bank*, 672 So. 2d at 1239-40.

[445] 37 So. 121 (Miss. 1904).

[446] *Barataria Canning Co.*, 37 So. at 122.

> not be divested of its ownership by implication, and appellees can only acquire those rights by express grant.[447]

e. *Restrictive Covenants*

Mississippi courts generally disfavor restrictive covenants as restraints on alienation,[448] and should, if the terms are ambiguous, strictly construe a restrictive covenant "against the person seeking the restriction and in favor of the person being restricted."[449] Where the language of a restrictive covenant is clear and unambiguous, on the other hand, Mississippi courts should not disregard the covenant merely because a use is prohibited or restricted. If the intent to prohibit or restrict be expressed in clear and unambiguous wording, enforcement is available in the courts of this state."[450]

In *A.A. Home Improvement Co. v. Hide-A-Way Lake Club, Inc.*,[451] the court upheld a covenant against non-residential use, stating:

> There is no ambiguity in the expression "No lot shall be used for other th[a]n residential purposes." Any additional use must be reasonably incidental to residential uses and such an inconsequential breach of the covenant as to be in substantial harmony with the purpose of the parties in making the covenants, and without substantial injury to the neighborhood. It is obvious that the use of Lot 52 on which there is no residence as a connecting roadway to an adjoining subdivision is not in any sense a residential use or a use incidental thereto. . . . The covenant which requires the appellee Club to maintain the roads, with the expense to be shared by all lot owners, shows an intent not to enlarge the exposure of the streets to more traffic than the layout of the plat and

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[447] *Id.* at 125.

[448] *See, e.g.*, Stokes v. Board of Dirs. of La Cav Improvement Co., 654 So. 2d 524, 527 (Miss. 1995); Kemp v. Lake Serene Property Owners Ass'n, Inc., 256 So. 2d 924, 926 (Miss. 1971).

[449] *Kemp*, 256 So. 2d at 926; *accord Stokes*, 654 So. 2d at 527; *see also* City of Gulfport v. Wilson, 603 So. 2d 295, 299 (Miss. 1992); Andrews v. Lake Serene Property Owners Ass'n, 434 So. 2d 1328, 1331 (Miss. 1983).

[450] *Andrews*, 434 So. 2d at 1331; *accord Stokes*, 654 So. 2d at 528.

[451] 393 So. 2d 1333 (Miss. 1981).

> its connections would produce.[452]

In determining whether a restrictive covenant is ambiguous, its language "is to be read in its ordinary sense, considering the entire document as well as the circumstances surrounding its formulation to ascertain its meaning, purpose, and intents."[453]

At issue in *Stokes v. Board of Directors of La Cav Improvement Co.*[454] was

> whether a deed restriction providing that "no building of any kind whatsoever shall be constructed on said Lot 17" precludes the repair of an earthen pier and construction of an L-shaped earth and wood addition to that pier so as to create a boat slip.[455]

The *Stokes* court resolved the issue as follows:

> The Stokes urge construction of this provision according to its plain language, that is, as prohibiting the erection of a house or other permanent structure on the lot. La Cav asserts that aside from the Stokes' failure to obtain Building Committee approval before repairing the pier, it objects only to construction of the boat slip. Based on the language used in the restrictive provisions of the warranty deeds to the other "non-building lots," which provides "that no buildings, structures, outbuildings or any other improvements shall be erected on the property conveyed except that a pier may be erected in the water in front of said lot," La Cav argues that although construction of a pier is permissible, construction of a boat slip is not.
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> . . . The limiting language of the Stokes' warranty deed restriction would clearly seem to prohibit construction of a

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[452] *A.A. Home Improvement Co.*, 393 So. 2d at 1336-37 (citation omitted).

[453] *Stokes*, 654 So. 2d at 527 (quotation omitted); *see Wilson*, 603 So. 2d at 299; Kinchen v. Layton, 457 So. 2d 343, 346 (Miss. 1984); Mendrop v. Harrell, 103 So. 2d 418, 422 (Miss. 1958); *see also* Schaeffer v. Gatling, 137 So. 2d 819, 820 (Miss. 1962) ("Covenants of this kind should be fairly and reasonably construed and the language used will be read in the ordinary sense.").

[454] 654 So. 2d 524 (Miss. 1995).

[455] *Id.* at 528.

> boat house, storage shed or some other outbuilding which would impede the view of the lake or clutter the small lot. However, when read in light of the restrictive language in the warranty deeds to the neighboring properties, we would construe the Stokes' deed as allowing construction of either a pier or a boat slip on Lot 17.[456]

Restrictive covenants may arise "by implication from the language used in an instrument or from the conduct of the parties," but, to do so, "the implication must be plain and unmistakable, or necessary."[457]

In *Schaeffer v. Gatling*,[458] for example, the subject deeds contained the following covenants:

> Said property is to be used strictly for residential purposes and is not to be used for automobile filling station, repair shop, tourist camp, bill boards, dance hall, store or for any other commercial or manufacturing purposes. No residences shall be erected on said land which shall cost less than $6,000.00, exclusive of outhouses or other buildings in connection with said residence, and the front of said residence, exclusive of any gallery or porch that may be attached to said building, shall be set back from the front, or Highway 61 line of said lot, not less than thirty-five (35) feet . . . .[459]

The issue was whether the use of a mobile home, if it met the "not less than $6,000" test, was prohibited.[460] The court said "no":

> The house trailer is being used "strictly for residential purposes." . . . Covenants of this kind should be fairly and reasonably construed and . . . . the restriction should not be extended by strained construction, especially when, as in this case, the restrictive covenants expressly permit the use being made of the land. If the original owner of the subdivision had desired to prohibit the use of house trailers as residences, this

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[456] *Stokes*, 654 So. 2d at 528-29.

[457] Wiener v. Pierce, 203 So. 2d 598, 603 (Miss. 1967).

[458] 137 So. 2d 819 (Miss. 1962).

[459] *Schaeffer*, 137 So. 2d at 819.

[460] *See id.* at 820.

> could easily have been accomplished by designating house trailers as prohibited use, or by restricting architectural design, or by placing a minimum on the floor space for a residence, or by prohibiting temporary residences. None of these things were done.[461]

f. Easements vs. Fees

An instrument that specifically conveys a right-of-way "will be construed as intending to convey only an easement"[462] unless the terms of the instrument clearly indicate the parties' intent to convey a fee. On the other hand, instruments "that specifically refer to a strip, parcel, or tract of land have been held to convey a fee"[463]—again, subject to the clearly ex-

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[461] *Id.* (citation omitted).

[462] Crum v. Butler, 601 So. 2d 834, 837 (Miss. 1992); *see* New Orleans & N.E. R.R. v. Morrison, 35 So. 2d 68, 70 (Miss. 1948); Williams v. Patterson, 21 So. 2d 477, 478-80 (Miss. 1945).

[463] *Crum*, 601 So. 2d at 838; *see* Alabama & Vicksburg Ry. v. Mashburn, 109 So. 2d 533, 535-36 (Miss. 1959); Mississippi Cent. R.R. v. Ratcliff, 59 So. 2d 311, 314 (Miss. 1952).

But what about a deed that mentions both a strip, a parcel, or tract of land and a right of way? "It is here," cautions the Mississippi Supreme Court, "that the instrument becomes unclear and leans toward ambiguity." *Crum*, 601 So. 2d at 838. There were two deeds at issue in *Crum*—the "1883 deed" and the "1887 deed." The 1883 deed provided in relevant part:

> [P]arties of the first part have granted, bargained and sold and by these presents do grant, bargain and sell unto the said party of the second part *a right of way One Hundred Feet wide through the lands* belonging to said parties of the first part . . . . The said right of way to extend fifty feet on each side of the center of a Railroad to be constructed by the party of the second part on such line as the said party of the second part may hereafter adopt as a permanent location for its road. To have and hold unto the said party of the second party and assigns forever *for the purposes hereinafter Specified and none other, that is to say for the purpose of building, constructing and operating a line of railroad on said right of way.* And the said party of the second part shall have the right to dig earth, quarry rock, Cut timber and do such other things on said right of way as are necessary and convenient in constructing and operating its line of Railroad thereon and to fell any timber beyond the right of way herein granted which is sufficiently near the track of said road to fall on and obstruct the same. The party of the second part agrees and binds itself to construct and maintain such drains as will prevent the railroad from interfering with the drainage of the property.

> It is understood that should the railroad herein mentioned not be built within eighteen months from the date hereof then this Contract shall be null and void.

Id. at 836-37 (emphases in original). The 1887 deed provided in relevant part:

> I hereby give, grant, bargain, convey and sell to the Louisville New Orleans and Texas Rail Road Company *for Right of Way, a strip of land* 100 feet wide that is 50 feet on each side of the center of the Road bed now constructed thereon . . . . To have and to hold unto the said Rail Road Company and its assigns forever for the purpose of building and constructing and operating a line of Rail Road on said Right of Way and the said Rail Road Company to have the right to dig earth, quarry rock, cut timber and do such other things on said right of way as are necessary and convenient in constructing and operating its line of Rail Road thereon, and to fell any timber beyond the right of way herein granted, which is sufficiently near the track of said Road to fall on and obstruct the same. . . .

Id. at 838 (emphasis in original).

The court approved the chancellor's finding that the 1883 deed granted "merely an easement." *Id.* The court found the 1887 deed to be "unclear and ambiguous." *Id.* at 839. Falling back on the *contra proferentem* maxim (the 1887 deed having been drawn up by the railroad), *see supra* subpart II.D.1, the court held that the 1887 deed, too, granted merely an easement. *See Crum*, 601 So. 2d at 839. The *Crum* court explained:

> When we compare the 1883 deed and the 1887 deed it is clear that the grantors in the 1883 deed intended only to convey a right of way. The instrument states that they did "grant, bargain and sell . . . a right of way 100 feet wide through the lands. . . ." The grant was for the purpose of building, constructing and operating a line of railroad on the right of way and none other. The instrument specifically points out that it is a grant of a right of way through the land and not a grant of the land. The chancellor correctly held that the 1883 deed granted merely an easement.
>
> . . . . Crum contends that the chancellor gave undue influence to the term "right of way" in accepting it to mean merely an easement or right to cross. . . . Crum contends that the term "right of way" has a two fold significance; one being a mere intangible right to cross and the other indicating a strip of land which a railroad appropriates for its use.
>
> We are struck by the fact that both the 1883 deed and the 1887 deed clearly point out that the conveyances were for the purpose of constructing and operating a railroad on the right of way. . . .
>
> The 1887 deed in its granting provision conveys "for a Right of Way, a strip of land" to the railroad. The *habendum* clause of the deed provides that the conveyance is to the railroad and "its assigns forever for the purpose of building and constructing and operating a line of Rail Road . . . "
>
> The instruments here are unclear and ambiguous. Where terms of a

pressed intent of the parties to the contrary.

In *Dossett v. New Orleans Great Northern R.R.*,[464] the grantors agreed to "grant, sell, assign, convey and warrant unto New Orleans Great Northern Railroad . . . its successors or assigns," (1) "a strip of land for a right of way, to be selected by survey and location by [the Railroad] . . . two hundred feet in width (being one hundred feet on each side of the center line of the Railroad Track) in, over, upon and across the following described lands . . . ."; and (2) "all the timber growing on said right of way, together with the right to use therefrom earth, gravel, stones, shells and other materials for the construction and maintenance of said railroad[,] [t]o have and to hold . . . forever, with full warranty, and substitution and subrogation to all our rights in and to the lands hereby conveyed."[465]

The court opined

> that the language used in the written instrument here involved was sufficient to indicate the sale of land, rather than right to use land. Since, however, there are phrases, sentences and clauses in the deed which tend to make the meaning of the deed unclear and ambiguous, we must resort to the legal rules of construction as to what the parties considered the instrument to be a deed. It is apparent that the parties considered the instrument to be a deed. Moreover, where the language of an instrument is unclear and ambiguous as to the estate intended to be conveyed, the instrument should be construed to convey the fee rather than a lesser estate.[466]

> contract are vague or ambiguous, they are always construed most strongly against the party who drew it. The 1883 deed and the 1887 deed were prepared not by Day, but by the railroad.
>
> We are of the opinion that the chancellor correctly ruled that the 1887 deed also conveyed merely a right of way.

Id. at 838-39 (citations omitted).

[464] 295 So. 2d 771 (Miss. 1974).

[465] *Dossett*, 295 So. 2d at 775-76.

[466] *Id.* at 775.

g. Leases

1). Renewal Options

Mississippi law does not favor perpetual leases.[467] Therefore, the parties' "intention to give the right to perpetual renewals must appear in clear and unequivocal language."[468]

In *Howard v. Tomicich*,[469] the written contract provided that it would be effective "from January 1, 1901, to January 1, 1902, 'with privilege of longer.'"[470] The question for the court was "whether a lease of premises for one year 'with privilege of longer,' secures to the lessee the right of renewal of the lease at his option."[471] The court concluded that it did not:

> It is too vague and uncertain to constitute a binding covenant. In this writing the question is, what was the intention of the parties, or, more properly, the meaning of the words in the clause under consideration? . . . [A]ppellee has testified that in this clause he meant that appellant should have the preference of others for a new lease at whatever rental they could agree upon, whilst appellant swore that he meant to secure to himself the right to a second term of one year at the same rent. So the wisdom of the law excluding parol proof of intention is justified by the evidence on that point in this case. An unqualified covenant to renew a lease involves the making of a new lease of the same premises for the same period and at the same rent, and a stipulation providing for a refusal of the premises for a fixed period gives a right to a new lease at the same rent; but the covenant "with privilege of longer" has no certain meaning in regard to the term or the consideration of the lease. How much longer? Upon what conditions? Certainly the stipulation is uncertain in both respects.[472]

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[467] *See* Stampley v. Gilbert, 332 So. 2d 61, 63 (Miss. 1976); Lloyd's Estate v. Mullen Tractor & Equip. Co., 4 So. 2d 282, 285 (Miss. 1941)

[468] *Lloyd's Estate*, 4 So. 2d at 285; *accord Stampley*, 332 So. 2d at 63.

[469] 33 So. 493 (Miss. 1903).

[470] *Howard*, 33 So. at 493.

[471] *Id.*

[472] *Id.* at 493-94 (citations omitted).

2). Assignments

As a general rule, an assignee of a lease does not incur the obligations of the assignor unless they expressly so agree.[473] However, "in cases of general assignments involving leases, the assignee takes on the obligations of the assignor when the lease covenants involved 'run with the land,' regardless of express agreement."[474] Lease provisions which affect the property's use, condition, and value are said to "run with the land."[475]

An assignee assumes no obligations under the lease—including obligations that "run with the land"—when the assignment is given as collateral for a security interest.[476]

11. Antenuptial Agreements

Mississippi courts have long favored antenuptial agreements, when fairly made,

> not only on account of the security thereby provided for the wife, but also because . . . provision for the issue of the marriage is usually the great and immediate object in view; and therefore, the most favorable exposition will be made of the words of such instruments, to support the intention of the parties.[477]

An antenuptial contract is subject to the same rules of construction and interpretation applicable to contracts generally.[478]

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[473] Midsouth Rail Corp. v. Citizens Bank & Trust Co., 697 So. 2d 451, 455 (Miss. 1997); Coggins v. Joseph, 504 So. 2d 211, 213 (Miss. 1987).

[474] *Midsouth Rail*, 697 So. 2d at 455; *see Coggins*, 504 So. 2d at 214.

[475] *Midsouth Rail*, 697 So. 2d at 455.

[476] *Id.* at 457; *see also* Kroger Co. v. Chimneyville Properties, Ltd., 784 F. Supp. 331, 340 (S.D. Miss. 1991). More generally, a collateral assignee of a lease "should not be burdened with the obligations of the assignor." *Midsouth Rail*, 697 So. 2d at 458.

[477] Estate of Hensley v. Estate of Hensley, 524 So. 2d 325, 327 (Miss. 1988); *see* Gorin v. Gordon, 38 Miss. 205, 210-11 (1859).

[478] *Estate of Hensley*, 524 So. 2d at 327.

12. Postnuptial Agreements / Property Settlement Agreements

Mississippi law

> favors the settlement of disputes by agreement of the parties and, ordinarily, will enforce the Agreement which the parties have made, absent any fraud, mistake, or overreaching. This is as true of agreements made in the process of the termination of the marriage by divorce as of any other kind of negotiated settlement. They are contracts, made by the parties, upon consideration acceptable to each of them, and the law will enforce them. Courts will not rewrite them to satisfy the desires of either party. With regard to the property of the parties, this is a strong and enforceable rule with few, if any, exceptions.[479]

The rules applicable to the construction of written contracts in general apply to postnuptial agreements (also known as property settlement agreements).[480] That said, once a postnuptial agreement sufficient to comply with Mississippi's Irreconcilable Differences Divorce Act[481] is filed along with the final divorce decree, the terms of the property settlement agreement are treated as a part of the chancery court's final decree.[482]

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[479] McManus v. Howard, 569 So. 2d 1213, 1215 (Miss. 1990) (citations omitted); *see also* McBride v. Chevron U.S.A., 673 So. 2d 372, 379 (Miss. 1996) ("Our law favors settlement for many reasons, not the least of which includes the expeditious closure of cases."). See *supra* subpart II.E.5 for a discussion of construing settlement agreements in general.

[480] *See* Roberts v. Roberts, 381 So. 2d 1333, 1335 (Miss. 1980); *see, e.g.*, Meek v. Warren, 726 So. 2d 1292, 1293-94 (Miss. Ct. App. 1998). Thus, for example, "where ambiguities may be found, the agreement should be construed much as is done in the case of a contract, with the court seeking to gather the intent of the parties and render its clauses harmonious in the light of that intent." Switzer v. Switzer, 460 So. 2d 843, 846 (Miss. 1984); *see* Owen v. Gerity, 422 So. 2d 284, 288 (Miss. 1982) (construing property agreement against ex-wife whose attorney had prepared the agreement); Hoar v. Hoar, 404 So. 2d 1032, 1035 (Miss. 1981) (where property agreement was ambiguous, court correctly allowed parol evident to show intent); *Roberts*, 381 So. 2d at 1335.

[481] MISS. CODE ANN. § 93-5-2 (Supp. 1998).

[482] *Id.* In *Switzer*, the court explained that the Irreconcilable Differences Divorce Act

> contemplates that the parties will negotiate a settlement of all matters, including a division of property and respective rights and responsibilities

Construing a postnuptial contract in the context of a dispute between the estate of one ex-spouse and the surviving ex-spouse, the Mississippi Supreme Court has written:

> The rule is, as to a postnuptial agreement, that only such rights in the estate of the deceased spouse are barred as are expressly enumerated or reasonably inferable from the language employed therein. In construing such agreements the purpose must be clear to exclude the surviving spouse from having his or her rights of inheritance in the deceased spouse; and they will be so construed only so far as the agreement clearly requires.[483]

The court in *Roberts v. Roberts*[484] construed a property settlement agreement that was filed but was not adjudicated before the husband died suddenly. The court noted:

> In support of their contention that the widow contracted away her right to inherit, the appellants (brothers and sisters

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> in relation thereto. The statute further contemplates that this property settlement agreement will be filed with the court before a final decree may be entered.
>
> When the statute has been complied with, the . . . agreement becomes a part of the final decree for all legal intents and purposes. . . . If the agreement is sufficient to comply with the statute, that is enough to render it a part of the final decree of divorce the same as if a decree including the same provisions as may be found in the property settlement agreement had been rendered by the Chancery Court following a contested divorce proceeding.
>
> We have heretofore held that, for purposes of subsequent modification proceedings, alimony and child support provisions found in an agreement made incident to an irreconcilable differences divorce are treated the same as though the chancellor had made the award after a contested divorce trial. There is no reason on principal why a property settlement provision such as that in controversy here should not be similarly treated as though it were a part of the divorce decree.
>
> As a matter of law, a property settlement prepared and filed in compliance with the statute can never be a document extraneous to the final decree. This rule is compelled by the logic implicit in Section 93-5-2. Any other rule would exalt form over substance and inevitably produce arbitrary and inequitable results.

Switzer, 460 So. 2d at 845-46 (citations omitted).

[483] Kirby v. Kent, 160 So. 569, 572 (Miss. 1935) (citations omitted).

[484] 381 So. 2d 1333 (Miss. 1980).

> of the deceased) cite language in the . . . preamble to the Roberts' agreement which states:
>
>> WHEREAS, irreconcilable difference having arisen between them, and they are now living separate and apart and now desire to make a mutually acceptable settlement of their respective rights, liabilities, obligations and property rights arising out of and during the course of their marital relationship;. . .
>
> The appellants urge this Court to adopt the reasoning that the widow's status as an heir "arises out of" the marital relationship . . ., and that she is precluded from asserting her status as an heir of the deceased husband to claim the property allotted to him under the property settlement agreement.
>
> . . . .
>
> . . . . [C]onsidering the language of the preamble . . . with the language found in Paragraph eight which states: "This agreement shall be binding not only upon the Husband and Wife, but also upon their heirs, successors and assigns", and together with the provision in Paragraph twelve that "This agreement . . . is not contingent upon either party procuring a divorce from the other", the instrument clearly manifests the parties [sic] intention that the property settlement was to be final and binding, not only while they lived, but, also, in the event of the death of one of the parties whether a divorce was obtained or not. Mrs. Roberts received her share of approximately one-half of the couple's property under the agreement, and she is now precluded by that same agreement from claiming the other one-half as the sole heir of the deceased.[485]

13. *Wills, Testamentary Trusts, and Related Documents*

The same rules of construction and interpretation that apply to written instruments generally also apply to trust instruments "whether they are contracts, deeds, or wills."[486] As such, a court's primary responsibility is to determine and give effect the intent of the testator or testatrix[487]—as long as that intent is not contrary to law or public policy.[488]

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[485] *Roberts*, 381 So. 2d at 1334-35 (emphasis omitted).

[486] Hart v. First Nat'l Bank of Jackson, 103 So. 2d 406, 409 (Miss. 1958).

[487] *See* Estate of Williams v. Junius Ward Johnson Mem'l Young Men's Chris-

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tian Ass'n, 672 So. 2d 1173, 1175 (Miss. 1996); Estate of Blount v. Papps, 611 So. 2d 862, 866 (Miss. 1992); *In re* Estate of Dedeaux, 584 So. 2d 419, 421 (Miss. 1991); *In re* Estate of Vick, 557 So. 2d 760, 765 (Miss. 1989); Tinnin v. First United Bank of Miss., 502 So. 2d 659, 663 (Miss. 1987); Stovall v. Stovall, 360 So. 2d 679, 681 (Miss. 1978); *In re* Estate of Granberry, 310 So. 2d 708, 711 (Miss. 1975); *Hart*, 103 So. 2d at 409; Yeates v. Box, 22 So. 2d 411, 413 (Miss. 1945); *see also In re* Raworth's Estate, 52 So. 2d 661, 663 (Miss. 1951) ("[I]n the absence of a clear intent to the contrary, that construction should be adopted which will result in a just and reasonable disposition of the property."), *quoted with approval in Estate of Blount*, 611 So. 2d at 866.

[488] *Tinnin*, 502 So. 2d at 664; *see* Dealy v. Keatts, 128 So. 268, 270 (Miss. 1930); *In re* Will of Griffin, 411 So. 2d 766, 767 (Miss. 1982). The *Tinnin* court stated that

> [f]or reasons of social policy, our law has come to provide that one may not wholly disinherit one's spouse, that one may not attempt purchase of a ticket to heaven by leaving his entire estate to the church, that one may not control ownership of property beyond life in being plus twenty-one years [and] . . . that entitlement one is eligible to enjoy on one's merits shall not be denied by reason of one's race, color or creed.

Tinnin, 502 So. 2d at 664. In *Tinnin*, the court was asked to construe a will, the residuary clause of which sought to set up a charitable educational trust to benefit only Caucasian students. The court prefaced its analysis as follows:

> Where a testamentary devise fails, because it "violates law or social policy" or for whatever reason, and where the will's residuary clause fails to pick it up, again for whatever reason, the force of the private law is thought spent. Our public law provides for the descent and distribution of property not effectively devised by will. . . .
>
> Our law in sum provides that the court, as here asked to construe a will, supplement it by the statutes on descent and distribution—thus adding the ultimate residuary clause—and by such administrative provisions or modifications as are authorized and necessary, and then restrict it by the various limitations our public law has imposed upon testamentary power. The composite document thus constructed is then construed as a whole with each part, each phrase, each word given effect, if that be possible. . . .

Id. at 665 (citations omitted).

Turning to the will, the court held as follows:

> We will never know what Allan Hobgood would have preferred to do with his money if he had known that no court would enforce his wish that his money be loaned exclusively to white students. The language he employed leaves no doubt that he did not want any of his money to be loaned to non-whites. Disingenuity attends the suggestion that the racially exclusive language of the will was incidental or an afterthought. . . .
>
> Recognition of the unmistakable meaning of this clause, however,

> The surest guide to testamentary intent is the wording employed by the maker of the will. Indeed, the intention of the testator is to be found, not in what he intended to say but what he did say. We have authority to give effect to the testator's intent only where that intent has received some form of direct or reasonably implied expression in the will.[489]

> leaves us far short of solution to today's construction riddle. . . . The Chancery Court . . . . looked at the racially restrictive clause and asked whether it was incidental or integral. The court should have directed its attention to the alternative dispositions argued for and sought a just and reasonable disposition of Allan Hobgood's will as consistent as may be decreed by reference to the general plan reflected by his reconstructed will. More precisely, the alternatives below and here are (a) striking the racially restrictive clause and continuing the trust and (b) causing the trust to fail and the property to be distributed to the Tinnins, the testator's heirs at law. We know for a fact that Allan Hobgood did not wish either of these alternatives. The question is which is less offensive the general plan of his reconstructed will.
>
> . . . Lucille Hamilton Hobgood Tinnin, Allan's aunt of the half blood, was not mentioned in his will. Indeed, when the will was made, Allan's mother appears to have been his sole heir at law, so that there is no reason for him to have thought of the possibility that Aunt Lucille would share in his estate, much less that her four children might take it all. While it is true that we construe wills favorably to those who would take under the laws of descent and distribution, unless the testator has manifest an intent to the contrary, we do so far more readily in favor of next of kin than remote kin. . . .
>
> The Tinnins' argument is filled with anomaly: because of the unenforceable racially restrictive intention of the testator, the trust, they argue, must fail and the assets must be distributed to four individuals we may say with confidence the testator never intended to benefit. We are asked to give effect to Allan Hobgood's intention by decreeing something we may say with confidence he never intended. . . .
>
> The question resolves itself to whether, given the unenforceability of the racially restrictive clause, Allan Hobgood's reconstructed will should be held to direct that the trust continue on a non-discriminatory basis or that all of its assets go to the Tinnins. The will as reconstructed in accordance with the principles of Section III above is unclear in this regard. The record before us, which is wholly documentary, is inadequate to enable us to answer this question with confidence.

Id. at 668-69 (quotation and citations omitted). The court vacated the chancery court's judgment and remanded for a trial on the merits, in which extrinsic evidence should be considered to resolve the ambiguities inherent in the reconstructed will. *See id.* at 669-70.

[489] *In re* Estate of Anderson, 541 So. 2d 423, 428 (Miss. 1989) (citations omit-

Courts should construe, and the testatrix's intent pursued, from the "usual and ordinary language" expressed in the will.[490] "The words of a [w]ill are to be construed according to the rules of construction applicable to ordinary speech, except when technical terms are employed."[491] Even then, "[w]here a testator is not familiar with the technical meaning of words, the words used in the will are to be taken in their ordinary and common acceptance."[492]

> [I]f what the testator has said leaves no doubt in the minds of persons of ordinary experience and intelligence as to what he meant[,] [t]he intention of the testator is not to be defeated merely because apt legal words were not used and the language is ungrammatical and clumsy, or because words which are clearly implied have been inadvertently omitted.[493]

The first granting clause in *In re Estate of Dedeaux*[494] read: "It is my desire that if I should preceed [sic] my wife Kay in death that all of my earthly possessions be received by her."[495] The court found this effective to devise the testator's entire estate to his wife:

> There can be but little doubt that if this is all the instrument stated, his widow Kay would have been deemed the sole legatee and devisee under his will, and would have taken all.

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ted); *accord Tinnin*, 502 So. 2d at 663; Byrd v. Wallis, 181 So. 727, 732 (Miss. 1938); *see also Estate of Dedeaux*, 584 So. 2d at 421 ("[I]n determining his intent in this case, we are restricted to the four corners of the will itself."); Rice v. McMullen, 43 So. 2d 195, 203 (Miss. 1949); Lanham v. Howell, 49 So. 2d 701, 702 (Miss.), *cert. denied*, 342 U.S. 834 (1951). *But see* Hemphill v. Robinson, 355 So. 2d 302, 307 (Miss. 1978) (holding that wills are to be construed "in the light of circumstances surrounding testator at the time the Will was written." (citing *In re* Estate of Granberry, 310 So. 2d 708 (Miss. 1975)).

[490] *Hemphill*, 355 So. 2d at 306.

[491] *Id.*

[492] First Nat'l Bank of Laurel v. Commercial Nat'l Bank & Trust Co., 157 So. 2d 502, 504 (Miss. 1963).

[493] Paine v. Sanders, 135 So. 2d 188, 192 (Miss. 1961); *accord In re Estate of Dedeaux*, 584 So. 2d at 422.

[494] 584 So. 2d 419 (Miss. 1991).

[495] *In re Estate of Dedeaux*, 584 So. 2d at 421.

> When Dr. Dedeaux wrote "all of my earthly possessions" we cannot avoid concluding he meant everything he owned. Others might write it differently yet with no clearer meaning. And just as clear is that by "received" Dr. Dedeaux meant for Kay to get "all my earthly possessions." Kay and no one else was to be the recipient of all his property . . . .
>
> In giving legal effect to an instrument prepared by a layman, a court should endeavor to ascertain what the words contained in it meant to the author, not simply what they could connote to a lawyer. Unless instructed in legal niceties, by the ordinary words "possessions" and "receive" with no further qualification or restriction, Dr. Dedeaux must surely have meant for Mrs. Kay Dedeaux to receive and own everything he possessed and owned.[496]

If a will is reasonably susceptible to more than one construction, "it is the duty of the court to adopt that construction which is most consistent with the intent of the testator [or testatrix]."[497]

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[496] *Id.* (citations omitted).

[497] Estate of Williams v. Junius Ward Johnson Mem'l Young Men's Christian Ass'n, 672 So. 2d 1173, 1175 (Miss. 1996); Deposit Guar. Nat'l Bank v. First Nat'l Bank of Jackson, 352 So. 2d 1324, 1327 (Miss. 1977); *see* Malone v. Malone, 379 So. 2d 926, 928 (Miss. 1980).

In pursuit of the decedent's intent, the Mississippi Supreme Court has, at times, taken a more inclusive approach to construing wills than it does to other instruments:

> The first inquiry, when we come to the construction of [a] will, is whether the court is shut up to a mere inspection of the instrument, or may look to extraneous evidence for the purpose of discovering the meaning of the testatrix, as found in the language she has employed . . . .
>
> It is a well-settled canon for the construction of wills that the court will take into consideration the attending circumstances of the testator, the quantity and character of his estate, the state of his family, and all facts known to him which may reasonably be supposed to have influenced him in the disposition of his property; that if, when viewed in this light, and from the standpoint of the testator, the language of the will cannot reasonably be so construed as to carry out his discovered purpose, the will and not the intent of the testator must control. In other words, if the will, as made, may, without violence to its terms, be so construed as to effectuate the purpose of the testator, as disclosed by the will and attending circumstances, the courts will so construe it; but no

> [N]o two wills probably ever were written in precisely the same language throughout, and probably no two testators ever did die under precisely the same circumstances in relation to their estate, family, and friends, so that technical rules of law and adjudicated cases are not of as great assistance in the construction of a will as they are in the construction of some instruments of a different character, still they are not to be disregarded altogether, but should be followed, unless to do so would do violence to the clear intent of the testator.[498]

A will and any valid codicils thereto must be construed together to ascertain the testatrix's intent.[499] "Otherwise the codicil cannot be given any operative effect, and this would be inconsistent with testatrix's intent."[500]

The fact that a testator or testatrix made a written will is

> circumstances are sufficient to control the clear and unambiguous language of the will.

Schlottman v. Hoffman, 18 So. 893, 895 (Miss. 1895); *see also* Henry v. Henderson, 60 So. 33, 37 (Miss. 1912) ("The sole object of construing a will is to arrive at the intention of the maker; and this intention must be gathered from the whole instrument, construed in the light of the circumstances surrounding the maker at the time of the execution thereof."). *But see* Estate of Blount, 611 So. 2d 862, 866 (Miss. 1992); *Estate of Dedeaux*, 584 So. 2d at 421; *In re* Estate of Anderson, 541 So. 2d 423, 428 (Miss. 1989); Tinnin v. First United Bank of Miss., 502 So. 2d 659, 663 (Miss. 1987); Cockrell v. Jones, 275 So. 2d 105, 107 (Miss. 1973) (all requiring "four corners" approach).

[498] *Henry*, 60 So. at 37.

[499] Hemphill v. Robinson, 355 So. 2d 302, 307 (Miss. 1978); *see also* Hemphill v. Mississippi State Highway Comm'n, 145 So. 2d 455, 458 (Miss. 1962); Magee v. Estate of Magee, 111 So. 2d 394, 402 (Miss. 1959); Joiner v. Joiner, 78 So. 369, 370-71 (Miss. 1918). The *Joiner* court stated that a

> codicil is defined as an addition or supplement to a will, and, unless it shall contain express words of revocation applicable to all existing wills, it does not work a revocation, except to the precise extent that the intention of the testator as it is contained and expressed in the codicil is irreconcilable and inconsistent with his intention as it has been expressed in the wills.

Joiner, 78 So. at 370. Therefore, "[a] devise contained in the will should not be upset unless the words employed in the codicil show a manifest intention to revoke the gift contained in the will, or unless such intention to revoke is necessarily inferable from the words of the codicil." *Id.*

[500] *Hemphill*, 145 So. 2d at 458.

"powerful evidence" of his or her "intention that his [or her] estate not pass according to the laws of descent and distribution."[501] As a consequence, Mississippi courts should construe wills so as to avoid intestacy, if that may reasonably be done.[502]

a. Charitable Gifts

If one construction of a will causes a charitable gift to fail completely and another construction validates the gift, a court should adopt the construction supporting the gift.[503] That said, Mississippi courts "are not at liberty to infer an intent different from that clearly shown by the language of the will" despite the Mississippi Supreme Court's "favorable disposition toward charitable gifts."[504]

In *Estate of Williams v. Junius Ward Johnson Memorial Young Men's Christian Ass'n,*[505] the will of the testatrix Fannie A. Williams, provided for the creation of three charitable trusts which would be funded by the residuary estate to benefit "the YMCA in Vicksburg, Kuhn Memorial Hospital in

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[501] *Tinnin,* 502 So. 2d at 663.

[502] *Id.*; *see* Richardson v. Browning, 192 So. 2d 692, 694 (Miss. 1966); Cooper v. Simmons, 116 So. 2d 215, 218 (Miss. 1959); Richmond v. Bass, 32 So. 2d 136, 137 (Miss. 1947).

[503] *See* Estate of Williams v. Junius Ward Johnson Mem'l Young Men's Christian Ass'n, 672 So. 2d 1173, 1175 (Miss. 1996); *Tinnin,* 502 So. 2d at 670.

[504] Johnson v. Board of Trustees of the Miss. Annual Conference of the United Methodist Church, 492 So. 2d 269, 276 (Miss. 1986).

As the court stated in *Tinnin*:

> Charitable trusts are favored and should be enforced where possible. Instruments to purportedly creating charitable trusts will be liberally construed in favor of the charity. Where there are two possible constructions of the instrument in question, one of which will render the charitable gift valid and the other of which will cause it to fail, we will adopt the construction which will sustain the charitable bequest, absent manifest countervailing considerations. Finally, there is a presumption, albeit a rebuttable one, that the testator preferred the charitable trust to survive so far as may be within the law.

Tinnin, 502 So. 2d at 670 (citations omitted).

[505] 672 So. 2d 1173 (Miss. 1996).

Vicksburg, and the Old Ladies Home in Jackson."[506] More specifically, with respect to the Old Ladies Home, the will provided:

> The trust for the Old Ladies Home in Jackson, Mississippi is limited strictly for the use of that organization in Jackson, Mississippi for the maintaining of an Old Ladies Home in Jackson, Mississippi. If the Old Ladies Home ceases to operate in Jackson as a viable entity, that trust terminates and all undistributed income and principal shall be divided equally among my other residuary trusts created by this article of my Will which have not terminated prior to that time.[507]

Some months prior to the execution of the will, and apparently unbeknownst to Ms. Williams, the Old Ladies Home relocated from West Capitol Street in Jackson to a newly-constructed facility in Madison, some three miles outside the Jackson city limits.[508] Kuhn Memorial Hospital having been closed by the State, the Vicksburg YMCA sought to have itself declared the sole beneficiary of the residuary estate on the grounds that the Old Ladies Home no longer existed "in Jackson."[509] Reciting the preference for a construction that will make a charitable gift valid, the Mississippi Supreme Court held:

> Although the testatrix's intent to establish a charitable trust would not be completely defeated by the disqualification of the Old Ladies Home Association, it is certainly more consistent with her testamentary intent to adopt a construction of her will that validates as many of her charitable bequests as possible. Fannie A. Williams clearly intended in her will to benefit an organization known as the Old Ladies Home which operated a home for elderly women in Jackson. There is nothing in the record that suggests that her interests were confined to the Jackson city limits as opposed to the Jackson metropolitan area. In fact, the Old Ladies Home Association

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[506] *Estate of Williams*, 672 So. 2d at 1174.

[507] *Id.*

[508] *See id.* at 1174-75.

[509] *See id.* at 1174.

> moved its facility outside the city limits of Jackson six months prior to the execution of the will. Thus, the only possible way to give effect to her testamentary wishes is to construe the phrase "in Jackson, Mississippi" as encompassing a larger geographic area beyond the city's corporate boundaries. This is the only reasonable construction.[510]

b. *Mutual, Joint, or Reciprocal Wills*[511]

The will of two or more persons "executed pursuant to an oral agreement or understanding, may, within itself, when considered and construed together, constitute a contract."[512] "The construction of joint and mutual wills and the contract under which they are made is governed by the rules relating to the construction of wills and contracts generally, including the rule that the situation of the parties and the surrounding circumstances are to be taken into consideration so as to determine the intent of the testators."[513]

In *Alvarez v. Coleman*,[514] Vernard and Dixie Droke, at the time husband and wife, executed a trust agreement transferring all their property into the "Droke Family Trust" to support them for life and then, after both had died, to be divided into two trusts, one-half for the benefit of Dixie's great-grandchildren and one-half for the benefit of the First Seventh Day Adventist Church in Memphis. The trust agreement was revocable by either Settlor until the death of either; at such point it would become irrevocable.[515] On the same day they executed the trust agreement, Vernard and Dixie executed nearly identical wills, leaving virtually all of their property to the Trust. Following Dixie's death, Vernard revoked the trust, and executed a new will leaving his estate to five of his nieces. Upon Vernard's death in 1988, his 1981 will was offered into probate by the trustee, and his 1987 will was offered by one of the nieces.[516]

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[510] *Id.* at 1175.

[511] A "mutual will" is "a will which is executed in pursuance of a compact or agreement between two or more persons to dispose of their property, either to each other, or to third persons in a particular manner." Monroe v. Holleman, 185 So. 2d 443, 448 (Miss. 1966). "The term 'mutual will' has frequently been used by the courts interchangeably with 'reciprocal will,' and with the same meaning, and, occasionally, as meaning a joint will; the terms 'joint wills' and 'mutual wills' are sometimes inaptly used interchangeably." *Id.* (quotation omitted). "Reciprocal wills' are those in which each of two or more testators makes a testamentary disposition in favor of the other or others, under a similar plan, either by executing separate wills or by all uniting in the same will, a will of the latter sort, or one both joint and reciprocal, being sometimes termed a 'double' will . . . ." *Id.* (quotation omitted).

[512] *Monroe*, 185 So. 2d at 448; *accord* Alvarez v. Coleman, 642 So. 2d 361, 372 (Miss. 1994).

[513] *Monroe*, 185 So. 2d at 448; *accord Alvarez*, 642 So. 2d at 372.

[514] 642 So. 2d 361 (Miss. 1994).

Reviewing the law of joint wills set forth in *Monroe v. Holleman*, discussed *supra*, the Mississippi Supreme Court held that Dixie and Vernard had breached an enforceable contract to make a joint will:

> Vernard's and Dixie's wills were clearly executed, together with the trust instrument, pursuant to an agreement or understanding. "Considered and construed together," as directed by *Monroe*, the instruments "constitute a contract."
>
> We held in *Monroe* that the surviving wife impermissibly repudiated the contract she and her husband had made concerning the disposition of their property . . . .
>
> Vernard, the surviving testator, was similarly bound by the contract contained in the November 18, 1981 wills and trust instrument, and similarly estopped from repudiating that contract. Dixie's half-interest in the marital estate became vested upon her death; Vernard could not thereafter revoke the mutual wills and trust agreement.[517]

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[515] *Alvarez*, 642 So. 2d at 362.

[516] *Id.* at 362-63.

[517] *Id.* at 372.

Turning to the question of the remedy available to those who were damaged by Vernard's breach of the joint will, the *Alvarez* court analogized the situation to the breach of an agreement not to revoke a will:

> In *Trotter v. Trotter*, we considered the breach of a contract not to revoke a will. We stated that the breach of such contract was not grounds for contesting the will itself, but that the promisor's heirs might have a remedy "on the contract or perhaps upon a constructive trust theory." In the case at bar, there was a contract to place all assets in a trust, to give the surviving spouse unlimited use and control over the assets, and to divide the residue of the estate (contained in the trust) at the survivor's death between Vernard's designee, the Church, and Dixie's

In the absence of an oral or written contract making the joint wills irrevocable on the death of one of the makers, however, the Mississippi Supreme Court has been reluctant to treat the two wills as anything more than two wills. In *Lane v. Woodland Hills Baptist Church*,[518] Julius and Beulah Rogers executed a joint will that read:

> Be it known that we, Julius P. Rogers and Beulah S. Rogers, . . . do hereby make, declare and publish this one true Joint Last Will and Testament, specifically revoking all previous wills.
>
> 1. On the death of one of us, the survivor shall become the full owner of all interest of the one dying in real and personal property, wheresoever situated, with full power in the survivor to own and control the same, and full power to sell and transfer any part of the said property, real, personal or mixed, and to convey good title to any of the property conveyed, and to be transferred and conveyed for any reason deemed good by the said survivor.
>
> 2. At the death of the survivor, the property not therefore disposed of by the survivor shall be and become the property of Woodland Hills Baptist Church, Old Canton Road, Jackson, Mississippi . . . .[519]

Unlike *Alvarez*, there was no separate trust document to which the joint will bound the makers to devise their property, nor was there any provision in the joint will or in a separate agreement (such as the trust agreement in *Alvarez*) making the joint will irrevocable on the death of Julius or Beulah, whichever might die first.[520] Following Julius's death, Beulah executed a new will leaving particular items of personal property to sever-

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> designee, her great grandchildren. Vernard breached this contract by attempting to transfer the residue of the estate to his designee exclusively. Dixie's great grandchildren may maintain a third party claim on this contract theory.

Id. at 372-73 (quoting Trotter v. Trotter, 490 So. 2d 827, 832 (Miss. 1986)).

[518] 285 So. 2d 901 (Miss. 1973).

[519] *Lane*, 285 So. 2d at 901-02.

[520] *See supra* note 515 and accompanying text.

al individuals.[521]

At trial, the chancellor held that Beulah's later-executed will was otherwise valid, but that the earlier joint will could not be revoked.[522] The supreme court reversed:

> It is well settled in this state that a joint will constitutes the separate will of each executing it. On the death of each, it may be probated as a will, and its legal effect is separate and distinct-not joint. The declared intentions of each of the testators affect only his own property or his share in joint property . . . .
>
> > While two or more persons may jointly execute a single testamentary document, sometimes spoken of as a joint, double, mutual, or reciprocal will, it is well settled in America that this document constitutes the valid separate will of each of those executing it, and that on the death of each it may be probated as a will . . . .
>
> If the will here involved constitutes anything more than a joint will, it must be gleaned from the will itself, since there is no evidence in the record to show any agreement or contract. After a careful study of the will executed by Mr. and Mrs. Rogers, we are of the opinion that it is nothing more than a joint will which under the law serves as the separate will of each of the parties. When Mr. Rogers died, this joint will was probated as his will. Whatever property he owned passed under this will and it cannot now be revoked. Since it was a separate will of each of the parties, Mrs. Rogers was free to make another will. This she did by executing the holographic will on December 20, 1968. The chancellor correctly found that the instrument was a valid will but was in error in holding that Mrs. Rogers could not revoke the joint will.[523]

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[521] *Lane*, 285 So. 2d at 902.

[522] *Id.* at 903.

[523] *Id.* at 903-04 (citations omitted) (quoting Hill v. Godwin, 81 So. 790, 791 (Miss. 1919)).

c. Perpetuities Problems

If reasonably possible, Mississippi courts should construe an ambiguous will so as to avoid conflict with the rule against perpetuities.[524] If part of the will conflicts with the rule against perpetuities and part does not, the court "should save such parts of the gift as the rigid requirements of the rule do not strike down, provided such action carries out the testator's principal purpose."[525] Such an approach "will preserve the policy of the rule, and at the same time preserve so far as may be the intention of testator."[526] Whether a testator's plan would be emasculated by sustaining only a part of it is a question of fact in each particular case.[527]

d. Other Special Rules

1). Time of Vesting

Mississippi law favors the vesting of an estate "at the earliest possible moment."[528] In the absence of contrary intent, a devise to a class of persons "vests immediately upon the death of the testator in the members of the class then in being, subject to open up and let in members of the class who may afterwards come into being, before the date fixed for the ascertainments of the members of the class."[529]

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[524] *See* Carter v. Berry, 136 So. 2d 871, 874 (Miss.) ["*Carter I*"], *modified on other grounds*, 140 So. 2d 843 (Miss. 1962).

[525] Carter v. Berry, 140 So. 2d 843, 850 (Miss. 1962) ["*Carter II*"]. As the *Carter II* court explained:

> Infectious invalidity is not a universal doctrine . . . . Where part of the testator's plan is valid and part invalid, the normal procedure is to examine the total plan of testator, and determine whether that part which is invalid is so integral to the total plan that it can be inferred testator would have preferred all to fail, rather than to have the valid part stand alone. If the valid part actually accomplishes most of testator's desires, then that portion should stand. The all-or-nothing rule ignores the proposition that the problem is one of separability, not of perpetuities; a question of construction, not of application of a rule of law. There is no reason to totally amputate an arm in order to save an infected finger. The general dispositive intent should control. The court should save such parts of the gift as the rigid requirements of the rule do not strike down, provided such action carries out the testator's principal purpose.

Id.

[526] *Id.*

[527] *Id.*

[528] *In re* Raworth's Estate, 52 So. 2d 661, 663 (Miss. 1951); *see In re* Estate of Blount, 611 So. 2d 862, 866 (Miss. 1992); Allen v. Allen, 110 So. 685, 686 (Miss.

2). Life Estates vs. Fees

Life tenancies "are not favored,"[530] such that

> where a grant or devise is made to one and his children, or issue, or the children or issue of his body, or equivalent words, and the named person has no child at the effective date of the instrument, that the named person takes a fee-simple title to the property conveyed or devised, unless the instrument by express words or necessary implication, shows a clear intent to create a life estate in the named person, remainder to after-born children or issue.[531]

3). Presumption in Favor of Next of Kin

If a provision remains unclear after applying more general rules of construction, Mississippi courts should construe that provisions "in a manner favorable to the next of kin."[532]

14. "Dragnet" Clauses

Mississippi courts should enforce a "properly executed and unambiguous dragnet clause in a deed of trust . . . according to its terms."[533] A dragnet clause is "properly executed" as long

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1927); Branton v. Buckley, 54 So. 850, 850 (Miss. 1911).

[529] *Allen*, 110 So. at 686; *accord Branton*, 54 So. at 850.

[530] *Raworth's Estate*, 52 So. 2d at 663; *see Estate of Blount*, 611 So. 2d at 866; Ewing v. Ewing, 22 So. 2d 225, 227 (Miss. 1945).

[531] *Ewing*, 22 So. 2d at 227.

[532] First Nat'l Bank of Laurel v. Commercial Nat'l Bank & Trust Co., 157 So. 2d 502, 504 (Miss. 1963); *see* Hart v. First Nat'l Bank of Jackson, 103 So. 2d 406, 409 (Miss. 1958); Cross v. O'Cavanagh, 21 So. 2d 473, 474 (Miss. 1945).

[533] Iuka Guar. Bank v. Beard, 658 So. 2d 1367, 1371 (Miss. 1995); *see* Kelso v. McGowan, 604 So. 2d 726, 729 (Miss. 1992); Whiteway Fin. Co. v. Green, 434 So. 2d 1351, 1353 (Miss. 1983); Trapp *ex rel.* First Miss. Bank of Commerce v.

as "both parties have agreed to the clause, and there was no fraud in the making of the contract."[534] In the absence of fraud or ambiguity, a properly executed dragnet clause "should be construed as written to cover subsequent debts created" by the debtor.[535]

If the creditor claims that a dragnet clause ensnares property that is otherwise exempt from execution as a matter of law, the court must strictly construe the clause in favor of the party entitled to the exemption.[536] A security agreement or mortgage that "employs broad language which purports to secure all debts of a borrower, but does not specifically list

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Tidwell, 418 So. 2d 786, 792 (Miss. 1982); Newton County Bank v. Jones, 299 So. 2d 215, 218 (Miss. 1974).

A "dragnet clause" typically consolidates all prior indebtedness between the parties, as well as any future indebtedness, into the debt evidenced by the writing containing the dragnet clause. For example, in *Hudson v. Bank of Leakesville*, the dragnet clause provided:

> In addition to the indebtedness specifically mentioned above, and any and all extensions or renewals of the same, or any part thereof, this conveyance shall also cover such future and additional advances as may be made to the grantor, or either of them, by the beneficiary, not to exceed the sum of $125,000.00, the beneficiary to be the sole judge as to whether or not such future and additional advances shall be made. In addition to all of the above, it is intended that this conveyance shall secure, and it does secure any and all debts, obligations, or liabilities, direct or contingent, of the grantor herein, or either of them, to the beneficiary, whether now existing or hereafter arising at any time before actual cancellation of this instrument on the public records of mortgages and deeds of trust, whether the same be evidenced by note, open account, over-draft, endorsement, guaranty or otherwise.

Hudson v. Bank of Leakesville, 249 So. 2d 371, 373 (Miss. 1971); *see also, e.g.*, Walters v. Merchants & Mfrs. Bank of Ellisville, 67 So. 2d 714, 717 (Miss. 1953) ("In addition to the aforesaid indebtedness and any and all extensions or renewals of the same or any part thereof, this instrument is intended to secure and does secure any and all debts that the said Grantors or either of them may incur with or owe to the said Beneficiary within 10 years from the statutory limitation of the within instrument from the date hereof, whether the same be evidenced by note, open account, assignment endorsement, or otherwise.").

[534] *Iuka Guaranty Bank*, 658 So. 2d at 1371; *see Walters*, 67 So. 2d at 717-18.

[535] *Iuka Guaranty Bank*, 658 So. 2d at 1371.

[536] *See Hudson*, 249 So. 2d at 373; Biggs v. Roberts, 115 So. 2d 151, 153 (Miss. 1959); Gardner v. Cook, 158 So. 150, 152 (Miss. 1934).

existing debt, . . . is ambiguous as to whether the antecedent debt is secured by the agreement."[537]

> In such cases certain principles must be applied to determine the intent of the parties. First, it must be considered whether the dragnet clause employed in the agreement is "boilerplate." The *Stewart* court noted that "[o]ften these clauses are not discussed between the borrower and the lender so that the borrower is not aware of the existence or the effect of these clauses." Second, the nature of the secured debt must be examined to determine the validity of the dragnet clause with respect to other debt. Where the debt which the lender seeks to have included under the dragnet clause is different in kind from the primary debt secured by the agreement, it is less likely that it was intended to be encompassed by the agreement. Third, heavy emphasis is placed on the fact that the antecedent loans are not listed in the agreement. "The rationale for excluding antecedent loans is that they are known to the lender at the time the agreement is drafted and should be included, if there is an intent to do so, since those loans are easily identifiable." Finally, this Court will consider whether the debt which the lender seeks to have included under the dragnet clause is otherwise fully secured.[538]

Merchants National Bank v. Stewart,[539] discussed in the preceding quotation, involved the sale of a farm by the Stewarts to their son and son-in-law, who agreed that the purchase price would include a balance of $400,000 on the original purchase still owed by the Stewarts plus the assumption of a small business loan in the amount of $108,000. The son and son-in-law each (1) executed a deed of trust in favor of the elder Stewarts in the amount of $170,000 for the purchase of land, (2) signed a second deed of trust in favor of the bank—securing a note for the remainder of the purchase money, which was also guaranteed by the Farmers' Home Administration (FmHA)—and (3) signed notes for crop production and irrigation loans. The Stewarts signed a hypothecation agreement in favor of the bank as security for the crop and irrigation loans, giving the bank an assignment of the first deeds of trust owed to them by the son and son-in-law.[540]

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[537] Wallace v. United Miss. Bank, 726 So. 2d 578, 586-87 (Miss. 1998); *see* Merchants Nat'l Bank v. Stewart, 608 So. 2d 1120, 1126 (Miss. 1992).

[538] *Wallace*, 726 So. 2d at 587 (citations and parentheticals omitted).

[539] 608 So. 2d 1120 (Miss. 1992).

The issue for the *Stewart* court was whether the hypothecation agreement also covered the notes for the purchase money secured by the second deed of trust.[541] The bank argued that it did, relying on the language granting the bank "a security interest in . . . any and all other indebtedness of [the son or son-in-law] to [the bank], created at any time before [the bank] shall have received written notice from [the Stewarts] terminating this Hypothecation Agreement and all renewals and extensions thereof."[542]

The *Stewart* court held that the purchase money loans were not within the scope of the hypothecation agreement:

> The language used by [the bank] in these agreements is "boilerplate" in nature as the agreement was a standard form used by the bank. The bank contends that the Stewarts were fully aware that [their son and son-in-law] had signed second mortgages before the hypothecation agreements were signed. This fact is undisputed, because all of the agreements were signed on the same day. The bank was aware also of the obligations and, as the drafter of the document, could have easily and explicitly included them within the hypothecation agreements.
>
> The primary debt secured by the hypothecation agreement was a line of credit to be used for crop production and irrigation. The notes the bank seeks to have included within the scope of the hypothecation agreement were for money to purchase land and were secured by that land, FmHA guarantees, and second liens. The chief obligation covered by the hypothecation agreement is different in nature. Moreover, the fact that these

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[540] *Stewart*, 608 So. 2d at 1122-23, 1125.

[541] *Id.*

[542] *Id.* at 1125 n.4 (emphasis omitted).

> notes were otherwise fully secured, further indicates that they were not intended to be included under the hypothecation agreements.[543]

Dragnet clauses do not "extend to debts purchased or otherwise acquired by a mortgagee from third parties against a mortgagor."[544] Nor may a dragnet clause be used to collect a debt owed by only one of multiple joint debtors, unless the clause specifically and expressly allows it.[545] On the other hand, where a single debtor owes secured debts to more than one joint creditor, the dragnet clause will encompass debts owed to less than all of the joint creditors.[546]

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[543] *Id.* at 1126-27. Notice the not-so-subtle invocation of *contra proferentem* in the first paragraph—when in doubt, hold the drafter "responsible" for any ambiguity. *See supra* subpart II.D.1. The *Wallace* court, likewise, appears to have resorted to *contra proferentem* to resolve the scope of the "dragnet" clause before it. *See* Wallace v. United Miss. Bank, 726 So. 2d 578, 588 (Miss. 1998).

[544] Hudson v. Bank of Leakesville, 249 So. 2d 371, 374 (Miss. 1971). The *Hudson* court stated:

> It is contended . . . that the language of the "dragnet" clause, "any other or further indebtedness in the way of future advances hereunder, or otherwise, that the grantor, or either of them, may now or hereafter owe the beneficiary . . . assented to by both grantors in the trust deed, is sufficiently broad and clear in its terms to secure the indebtedness of one of the grantors subsequently made to a third party. We are of the opinion that it is not. A majority of the states hold, and we find no Mississippi case in point, that the "dragnet" clause of a deed of trust or mortgage does not extend to debts purchased or otherwise acquired by a mortgagee from third parties against a mortgagor. We are of the opinion that the better and majority rule is pronounced in *Wood v. Parker Square State Bank*, 400 S.W.2d 898, 899 (Tex. 1966), with regard to the construction of a "dragnet" clause expressed in these terms:
>
> > "And this conveyance is made for the security and enforcement of the payment of said indebtedness and also to secure the payment of any and all other sums of money which may be advanced for or loaned to grantors by the beneficiary, his heirs or assigns."
>
> The court stated, in rejecting security for the third party indebtednesses:
>
> > * * * [It] was not contemplated or meant that the mortgagee could buy up third party debts which after the purchase would be secured by the mortgage; and that a mortgagee buying up claims held against his mortgagor by third persons cannot have them embraced in, and secured by, his mortgage, or included in the foreclosure decree, unless the language of the instrument provides in the clearest and most unmistakable terms for their inclusion, and unless such stipulation was expressly called to the mortgagor's attention and he assented thereto. These policy expressions are basically sound. (400 S.W.2d at 902).

> The term "in the way of future advances hereunder, or otherwise" used in the present trust deed is not sufficiently clear or in such unmistakable terms as to include the indebtedness made to the Leakesville Hardware Company. This is particularly so, we think, when it is considered that the enlargement of the security afforded is a direct diminution of the homestead and as such is subject to a liberal construction in favor of the exemptionist both as to common assent necessary for encumbering the homestead property and specificity of terms necessary to further encumber.

Hudson, 249 So. 2d at 374 (citation and emphasis omitted).

[545] *See, e.g.*, Holland v. Bank of Lucedale, 204 So. 2d 875, 877 (Miss. 1967); Walters v. Merchants & Mfrs. Bank of Ellisville, 67 So. 2d 714, 717 (Miss. 1953); Davis v. Crawford, 168 So. 261, 262 (Miss. 1936) (all holding that dragnet clause in deed of trust executed by husband and wife which secured future advances made to "them" did not secure advance made only to husband). As one court stated:

> The rationale undergirding the strict construction of dragnet clauses in co-debtor situations is that one co-debtor should not be held to have risked his equity for the future debts of another debtor absent a clear expression of intent . . . . If a creditor were allowed to foreclose against one such debtor, the other co-debtors would be in danger of losing their interest in the collateral without ever having defaulted on their own debts . . . .

Kelso v. McGowan, 604 So. 2d 726, 729-30 (Miss. 1992) (citations omitted). *But cf.* Iuka Guar. Bank v. Beard, 658 So. 2d 1367, 1371 (Miss. 1995) ("There is no requirement that the co-tenants have knowledge of the existence of other debts, or each others' consent to the creation of debt and the attendant lien against the property, in order for the dragnet clause to be enforceable.").

[546] *See, e.g.*, *Kelso*, 604 So. 2d at 729. In *Kelso*, one of the joint creditors, Pollack,

> sought to collect the amount of Kelso's two dishonored checks through foreclosure under the dragnet clause found in the deed of trust which secured Kelso's $50,000 notes to Pollack and Todaro. The subject dragnet clause states: "This Deed of Trust shall also secure any and all other Indebtedness of Debtor due to Secured Party . . . ." The deed of trust identifies "S.E. Pollack and Sal Todaro" as the "Secured Party." Kelso maintains that since the dragnet clause secured only debts owed to "Secured Party," and since the instrument referred to Pollack and Todaro *collectively* as "Secured Party," then the dragnet clause did not secure

15. *"Acceleration" Clauses*

An acceleration clause contained in a mortgage, lease, or security agreement will be effective only if it is "clear and unequivocal."[547] Any reasonable doubt as to the meaning of the language employed, requires a construction that will prevent the acceleration of maturity.[548]

Thus, in *Frey v. Abdo*,[549] the Mississippi Supreme Court held:

> [I]n order to find an acceleration clause in the instant lease agreement, the contractual language must clearly and unequivocally set forth such a clause. Careful reading . . . of the lease reveals no such clearly and unequivocally stated clause. Reasonable interpretation of the [lease] allows lessor, upon

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the two dishonored checks—an alleged debt owed to Pollack *individually*.

Id.

Kelso argued that the dragnet clause could not be invoked with regard to debts owed to less than all of the joint creditors:

> Kelso's proposed interpretation is facially contradicted by the express language of the deed of trust. The premises clause refers to the *principal* debt as follows: "WHEREAS, Debtor is indebted to Secured Party in the full sum of . . . $100,000.00 . . . evidenced by *two promissory notes* . . . in favor of Secured Party." (emphasis added). There is no way that the term "secured party," as used in the premises clause, can logically refer to the creditors as a collective entity: Pollack and Todaro do not hold the two promissory notes jointly. One note is in favor of Pollack only; the other is in favor of Todaro only.
>
> If the term "secured party" is not limited to a collective entity in the premises clause, then it cannot be so limited in the dragnet clause. Consequently, we must read the dragnet clause as securing "all other Indebtedness" of Kelso due to Pollack and/or Todaro, either jointly or individually.

Id. at 730 (citations and parentheticals omitted).

[547] Frey v. Abdo, 441 So. 2d 1383, 1385 (Miss. 1983).

An "acceleration clause" gives the creditor or lessor the power, upon the debtor's or lessee's default as to a single payment, to demand payment in full of the entire outstanding balance, including installments not yet due. *See, e.g.*, *Frey*, 441 So. 2d at 1384 ("It is further agreed that in default of any one or more of said rental payments, or any part thereof, this lease may be declared forfeited by the Lessor at her option, in which event the Lessee shall be liable for all rents remaining unpaid under this lease agreement . . . .").

[548] *Id.*; *see* Boatright v. Horton, 86 So. 2d 864, 868 (Miss. 1956).

[549] 441 So. 2d 1383 (Miss. 1983).

> the default by the lessee, to forfeit the lease, but whether it allows acceleration of amounts to become due in the future is not clearly stated. The provision could give two results: (1) the Lessor could immediately collect *all* the payments that are past due, or (2) the lessor could immediately collect *all* payments that the lease provides for–both past due and due in the future.
>
> Inasmuch as the lease is susceptible to two interpretations, the rule of *Boatright v. Horton*, *supra*, resolves the doubt in favor of that construction which would prevent acceleration. Thus we hold that the lease agreement did not contain an acceleration clause and any payment not yet due before suit was brought was not yet actionable.[550]

16. Bills of Lading

Mississippi courts should resolve any reasonable doubt regarding the construction of a bill of lading against the carrier and in favor of the shipper.[551]

Bills of lading "are subject to regulation under the law, and when a lawful regulation has been imposed it is not within the power of the carrier to destroy the regulation, by any printed form of contract required to be signed by shippers."[552] Stipulations and reservations in bills of lading "are made entirely for the benefit of the carrier, and will receive strict construction, to the end that through it just claims of shippers may not be defeated by dilatory methods in handling the claim."[553] As the court in *Lasky v. Southern Express Co.*[554] explained: "These stipulations are made on the back of contracts of shipment, and are rarely read by the shipper, and the one ground upon which they can be upheld is that they are reasonable regulations—not contracts in the true sense."[555]

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[550] *Frey*, 441 So. 2d at 1385.

[551] *See* Yazoo & Miss. Valley R.R. v. Nichols & Co., 83 So. 5, 7 (Miss. 1919), *aff'd*, 256 U.S. 540 (1921).

[552] Yazoo & Miss. Valley R.R. v. G.W. Bent & Co., 47 So. 805, 806 (Miss. 1908).

[553] *Id.* (quotation omitted).

[554] 45 So. 869 (Miss. 1908).

[555] *Lasky*, 45 So. at 870; *accord G.W. Bent*, 47 So. at 806-07; *see also* Illinois

The Mississippi Supreme Court

> has repudiated the idea that these printed stipulations may be given the force of a contract, fully, freely, fairly, and voluntarily entered into by private parties, but regards such stipulations more as regulations made by the carrier for its own benefit, the validity of which must depend on reasonableness and consistency with the general law.[556]

17. Covenants Not To Compete

Mississippi law disfavors covenants not to compete as restraints of trade and individual freedom.[557] Nonetheless, Mississippi courts will enforce them "when reasonable."[558]

In *Landry v. Moody Grishman Agency, Inc.*,[559] the parties entered into a written agreement whereby Landry agreed to work solely for Moody Grishman during the term of the agree-

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Cent. R.R. v. Lancashire Ins. Co., 30 So. 43, 43-44 (Miss. 1901) ("The common carrier must at all times be ready and willing to contract with the shipper on the terms and conditions imposed by law. If the carrier desire to limit its common-law liability, it can only do so by special contract with the particular shipper, freely and fairly entered into, and upon sufficient consideration.").

[556] *G.W. Bent*, 47 So. at 807

[557] *See* Empiregas, Inc. of Kosciusko v. Bain, 599 So. 2d 971, 975 (Miss. 1992); Texas Rd. Boring Co. of La.-Miss. v. Parker, 194 So. 2d 885, 888 (Miss. 1967); Frierson v. Sheppard Bldg. & Supply Co., 154 So. 2d 151, 156 (Miss. 1963).

As to the enforceability of such covenants, the *Empiregas* Court explained:

> The validity and, therefore, the enforceability of a non-competition provision is largely predicated upon the reasonableness and specificity of its terms, primarily, the duration of the restriction and its geographic scope. The burden of proving the reasonableness of these terms is on the employer. However, our inquiry does not end there. In *Donahoe v. Tatum*, 242 Miss. 253, 261, 134 So. 2d 442, 445 (1961), we acknowledged that the need to balance the rights of employers and employees "requires us to recognize that there is such a thing as unfair competition by an ex-employer as well as by unreasonable oppression by an employer." In so doing, we revitalized the rule first articulated in *Wilson v. Gamble*, 180 Miss. 499, 177 So. 363, 365 (1937), that non-competition agreements are only valid "within such territory and during such time as may be reasonably necessary for the protection of the employer or principal, *without imposing undue hardship on the employee or agent* . . . ."

Empiregas, 599 So. 2d at 975 (citations omitted).

[558] *Frierson*, 154 So. 2d at 156.

[559] 181 So. 2d 134 (Miss. 1965).

ment, in return for which Moody Grishman agreed to compensate Landry with a salary and a share of commissions.[560] The agreement provided that, if either party terminated the agreement prior to its expiration date, or if the agreement was not renewed at the end of the term, then

> the Employee agrees as a part of the consideration hereof not to compete with the employer in Harrison, Jackson or Hancock Counties, Mississippi, within a period of five (5) years from the date of termination of the contract, for whatever cause the same may be terminated. This agreement not to compete applies equally to the Employee acting in his own capacity or serving as an agent or Employee of another.[561]

The question was whether the clause "became operative upon the termination of the relationship of employer and employee on September 1, 1964."[562] The court found that it did not:

> This contract is plain and unambiguous. The restrictive clause became operative only if (1) the contract was terminated before December [3]1, 1963, or (2) if the parties did not enter into a contract for further employment (after December [3]1, 1963). Neither of the contingencies occurred . . . .
>
> . . . .
>
> . . . Landry was not prohibited from competing with the Grishman Agency under the terms of the contract and the undisputed facts. A restrictive clause in a contract is not favored by the law and the court will not exercise power which the contract itself does not invoke.[563]

18. Contingent Fee Contracts

"Every contingency fee contract has a provision, incorporated by implication if it does not explicitly appear in the text, that permits the client to discharge the attorney at any time with or without cause."[564]

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[560] *Landry*, 181 So. 2d at 135-36.

[561] *Id.* at 137-38.

[562] *Id.* at 139.

[563] *Id.* at 139-40.

[564] Estate of Stevens v. Wetzel, No. 96-CA-00343-COA, 1999 WL 58566, at *3

19. Express Warranties

An express warranty that warrants "each and every part" of a product "not only warrants each separate part, but warrants all the parts as a whole."[565] If the express warranty provides the method by which it is to be fulfilled, the warrantor is bound only to that method of performance unless the written warranty is unclear or ambiguous.[566]

In *Ford Motor Co. v. Olive*,[567] the written warranty provided that "defective parts were to be 'replaced or repaired' by 'the selling dealer at his place of business'"[568]:

> The plaintiff testified that the [selling dealer] did all it could to repair the automobile; that it replaced the defective parts and did everything plaintiff requested it to do; that plaintiff's relations with [the selling dealer] were very cordial . . . .
>
> . . . .
>
> The burden of proof was upon the plaintiff to show that the warranty was not "fulfilled" by the "selling dealer" by its failure to replace or repair defective parts, unless it was shown that the article sold was incapable of being repaired.
>
> In the instant case the testimony shows that the plaintiff made no attempt to rescind the sales contract, although he returned the automobile to the dealer many times for repair. The dealer repaired the automobile and the manufacturer furnished the parts and paid for the cost of labor. The plaintiff continued to use the automobile until he had driven it 24,000 miles. He returned it then, only when it was being repossessed.
>
> . . . [C]ontinued use of an automobile for a long period of time after it has been repaired in compliance with the manufacturer's warranty is sufficient to show that the repair was satisfactory to the purchaser.[569]

(Miss. Ct. App. Feb. 9, 1999).

[565] Ford Motor Co. v. Olive, 234 So. 2d 910, 913 (Miss. 1970).

[566] *See id.*

[567] 234 So. 2d 910 (Miss. 1970).

[568] *Id.* at 913.

[569] *Id.* (citation omitted).

III. THE ROLE OF EXTRINSIC EVIDENCE IN CONSTRUCTION AND INTERPRETATION

> *Application of "canons" of construction may provide a court with an objective inference of the parties' intent. But if, at this step in the process, intent remains unascertainable . . . , then the court may resort to a final tier in the three-tiered process of construction. This final tier entails consideration of extrinsic or parol evidence.*[570]

As a general rule, when two or more parties have executed an unambiguous, fully integrated, written agreement, extrinsic evidence is not admissible to prove either their intent or the meaning of the terms they used in the writing. However, if the court determines that the agreement is not fully integrated, or that the agreement is ambiguous, then the factfinder is free to consider extrinsic evidence that supplements, but does not contradict, those portions of the written agreement that are final and unambiguous, as well as any extrinsic evidence pertinent to those portions of the agreement that are not final and unambiguous, in order to resolve the ambiguity and determine the terms of the entire agreement—subject, of course, to the rules of evidence. Moreover, certain statutory and common law exceptions permit the factfinder to consider certain extrinsic evidence even though an agreement is fully integrated and unambiguous.

In order to better understand the body of common and statutory law permitting or proscribing the use of extrinsic evidence to construe and interpret written agreements, it helps to distinguish between, on the one hand, extrinsic evidence offered to explain the intent of the contracting parties at the time the contract was executed, and, on the other, extrinsic evidence offered to add to, subtract from, or otherwise modify the terms of a written agreement. The former "interpretive" type of evidence is not subject to the parol evidence rule. The latter "suppletive" type of evidence is subject to the parol evidence rule, and the trier of fact may not consider it until the trial court first finds that a written agreement is either not fully integrated or ambiguous, or both. Naturally, the line between interpretive and suppletive evidence is not nearly as clear in practice as it is in theory.

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[570] Pursue Energy Corp. v. Perkins, 558 So. 2d 349, 353 (Miss. 1990).

A. The Common Law Parol Evidence Rule

> *The essence of the parol evidence rule is that the embodiment of an agreement into a single writing makes all other utterances of the parties on that topic legally immaterial for the purpose of determining what are the terms of the contract.*[571]

As a general rule, evidence regarding prior or contemporaneous oral agreements or prior written agreements is inadmissible when it is offered to add to, subtract from, vary, or contradict the terms of a fully integrated, unambiguous, written agreement.[572] Put another way: "[I]n measuring the rights of the parties to a written contract or conveyance which, on its face, is unambiguous and expresses an agreement complete in all its essential terms, the writing will control."[573]

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[571] Chism v. Omlie, 124 So. 2d 286, 288 (Miss. 1960).

[572] *See* Security Mut. Fin. Corp. v. Willis, 439 So. 2d 1278, 1281 (Miss. 1983); Great Atl. & Pac. Tea Co. v. Lackey, 397 So. 2d 1100, 1102 (Miss. 1981); Byrd v. Rees, 171 So. 2d 864, 867 (Miss. 1965); Fuqua v. Mills, 73 So. 2d 113, 118-19 (Miss. 1954); Allen v. Allen, 168 So. 658, 659 (Miss. 1936); Housing Auth., City of Laurel v. Gatlin, 738 So. 2d 249, 251 (Miss. 1998).

One commentator offers the following "working definition" of the parol evidence rule:

> When the parties to an agreement have reduced their agreement to a writing intended by them, or treated by the court, as a final and complete statement of the entire agreement, the writing may not be contradicted, varied, or even supplemented by prior oral or written understandings of the parties. If the parties intended, or the court believes, that the writing was to be merely a final expression of some of the terms of the agreement, the writing may be supplemented but not varied or contradicted by prior oral and written understandings of the parties.

George I. Wallach, *The Declining "Sanctity" of Written Contracts—Impact of the Uniform Commercial Code on the Parol Evidence Rule*, 44 MO. L. REV. 651, 651 (1979).

This "venerable, honored, and well-established"[574] rule has been a fixture of Mississippi common law for nearly 180 years.[575] Therefore, any examples of its application must be understood as exactly that—mere examples.

In *Kerr v. Calvit*,[576] the first generally reported Mississippi Supreme Court case considering the application of the parol evidence rule, the dispute centered around a note, in the amount of $2,000, representing one-half the amount to be paid for a certain parcel of land, and a deed warranting that the land to be conveyed was "not more than 240 or 250 acres" and that the consideration for the conveyance was the sum of $4,000.[577] The plaintiff sued for payment of the note; the defendant sought to have the amount due reduced on the ground that the property conveyed was less than the defendant had anticipated.[578] The jury found, in part, for the defendant, and awarded the plaintiff $800.25, instead of the $2,000 stated in the note.[579] The plaintiff appealed.

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[573] Edrington v. Stephens, 114 So. 387, 389 (Miss. 1927).

[574] *Byrd*, 171 So. 2d at 867; *see also Gatlin*, 738 So. 2d at 251 (referring to parol evidence rule as "bedrock" rule of Mississippi law).

[575] *See, e.g.*, Houser v. Brent Towing Co., 610 So. 2d 363, 365 (Miss. 1992); Cooper v. Crabb, 587 So. 2d 236, 241 (Miss. 1991); Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., 584 So. 2d 1254, 1257 (Miss. 1991); Ross v. Brasell, 511 So. 2d 492, 495 (Miss. 1987); *Security Mutual Finance*, 439 So. 2d at 1281; *Lackey*, 397 So. 2d at 1102; *Byrd*, 171 So. 2d at 867; *Fuqua*, 73 So. 2d at 118-19; Credit Indus. Co. v. Adams County Lumber & Supply Co., 60 So. 2d 790, 791 (Miss. 1952); Taylor v. C.I.T. Corp., 191 So. 60, 62 (Miss. 1939); Fornea v. Goodyear Yellow Pine Co., 178 So. 914, 917 (Miss. 1938); State Hwy. Dep't v. Duckworth, 172 So. 148, 150 (Miss. 1937); Welch v. Gant, 138 So. 585, 585-86 (Miss. 1932); Jeffery v. Jeffery, 127 So. 296, 297-98 (Miss. 1930); Stirling v. Logue, 123 So. 825, 827 (Miss. 1929); *Edrington*, 114 So. at 389; Maas v. Sisters of Mercy of Vicksburg, 99 So. 468, 472 (Miss. 1924); Pole Stock Lumber Co. v. Oakdale Lumber Co., 54 So. 596, 596 (Miss. 1911); Hightower v. Henry, 37 So. 745, 745 (Miss. 1905); Maxwell v. Chamberlin, 23 So. 266, 267 (Miss. 1898); Pine Grove Lumber Co. v. Interstate Lumber Co., 15 So. 105, 106 (Miss. 1894); Kerr v. Kuykendall, 44 Miss. 137, 146 (1870); Wren v. Hoffman, 41 Miss. 616, 619-20 (1868); Thigpen v. Mississippi Cent. R.R., 32 Miss. 347, 353-54 (1856); Kerr v. Calvit, 1 Miss. (Walker) 115, 118 (1822); *Gatlin*, 738 So. 2d at 251.

[576] 1 Miss. (Walker) 115 (1822).

[577] *Kerr*, 1 Miss. at 115-16.

[578] *Id.* at 115. Both of these claims—failure of consideration and fraudulent misrepresentation—are legitimate contract defenses, and have been held, in other cases, to be exceptions to the parol evidence rule.

The only evidence at trial that appeared to support the defendant's position and the jury's finding was the testimony of one James Bouth, "who was a subscribing witness to the deed, but not present at its delivery."[580] Bouth testified that "at the time of signing the deed, he expressed some surprise" that the amount of land being conveyed was "only 250 acres, since he understood the sale to have been for four hundred acres," having lived on the tract for a year, and since Terry, the seller of the land, had told Bouth that the buyer "might get four hundred acres, more or less."[581] Another witness at trial, Fake, was present at the sale, and stated that the quantity represented was 250 acres and the consideration $4,000.[582] Finding Fake's testimony to be more reliable than Bouth's . . . , given Fake's presence at the closing and Bouth's absence, the Mississippi Supreme Court held for the plaintiff:

> [A]ll the evidence, which by any construction could imply fraudulent misrepresentations, goes to a period anterior to the deed, and is removed thereby, where the [seller] states the true quantity, and the true price, of which [the defendant] could not but be cognizant; . . . but it is sought to affect the consideration it acknowledges, by a reduction, in consequence of conversations which passed between the parties prior to the consummation of the contract . . . .
>
> . . . . [I]t cannot be a safe or salutary rule, to allow a contract to rest partly in writing, and partly in parol. Whenever it is reduced to writing, this has to be considered the evidence of the agreement, and every thing resting in parol becomes thereby extinguished.
>
> . . . . In the absence of fraud, which we consider this case not corrupted with, it will readily be conceded . . . that . . . the consideration for the land sold by [Terry] to Mrs. Covington could not be impeached, by parol evidence, having

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[579] *See id.*

[580] *Id.* at 116.

[581] *Id.*

[582] *Id.*

> relation to a period [prior to] the delivery of the deed . . . .[583]

In *Southern School Book Depository v. Holmes*,[584] the court considered whether parol evidence could be used to identify the "real parties in interest"—who the party proffering the parol testimony contended differed from the parties named in the written agreement. The court found this to be an impermissible attempt to use parol evidence to contradict an unambiguous writing:

> [T]he defect in counsel's position is that, in order to reach the end sought, he must by such evidence take from the contract the agreement to indemnify Davidson & Wardlaw, a partnership composed of E. A. Davidson and S. W. Wardlaw, and substitute therefor the very different agreement to indemnify the Southern School Book Depository, a partnership composed of Victor R. and Burgess Smith.
>
> If this can be done, then under the guise of identifying the parties in interest, or applying the terms of a contract to the subject-matter thereof, the intention of the parties to a contract can be shown by parol evidence to have been very different from that which appears from the written words thereof. In the case at bar, for instance, it could then, under such guise, be shown that it was not the contract of Steger-Holmes Company, the performance of which was intended to be guaranteed, but the contract of quite another and different party; that, while the penalty of the bond is recited to be $3,000, the real penalty was in fact in a different amount; that, although the contract on its face guarantees the performance by Steger-Holmes Company of a certain contract, the real contract intended to be performed was quite another and different one, etc.[585]

In *Credit Industrial Co. v. Adams County Lumber & Supply Co.*,[586] the plaintiffs alleged that they were owed payment by the defendant of three notes the plaintiffs purchased from

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[583] *Id.* at 116-18 (quotation omitted).

[584] 61 So. 698 (Miss. 1913).

[585] *Id.* at 699.

[586] 60 So. 2d 790 (Miss. 1952).

Carbozite Protective Coatings, Inc., from whom the defendants had purchased roofing materials under the terms of a franchise agreement entered into between the defendants and Carbozite.[587] The defendants sought to introduce testimony to support their defense that they were misled by Carbozite and that the plaintiffs knew or had reason to know of Carbozite's double dealing.[588] The trial court excluded this evidence,[589]

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[587] *Credit Indus.*, 60 So. 2d at 792.

[588] *See id.* at 792-93. Specifically, the defendants

> admitted that the above mentioned drafts had been accepted by the defendant partnership, as alleged in the plaintiffs' declaration, but the defendant partners alleged that they were not legally liable for the payment of said instruments because of the false representations made by the Carbozite Protective Coatings, Inc., in the procurement of said trades acceptances; and the defendant partners gave notice in their answer that they would offer to prove as a defense to the plaintiffs' action that said drafts were drawn on and accepted by the defendant partnership in payment of the purchase price of roofing materials purchased by the defendant partnership under the terms of a franchise agreement entered into by and between the Carbozite Protective Coatings, Inc., and the defendant partnership on January 4, 1950, a copy of which was attached to the defendant partners' answer; that as a part of the consideration for the execution of said instruments by the defendant partnership the Carbozite Protective Coatings, Inc., promised and agreed that it would make available to the defendant partnership a trained representative to instruct the defendant partners and their employees and prospective customers in the proper use and proper method of application of the Carbozite waterproofing materials, and that the Carbozite company would sponsor and conduct an intensive national and local advertising campaign to promote the sale of Carbozite roofing materials, and that a special truck, containing all the special equipment and machinery necessary to demonstrate the proper use and method of application of Carbozite roofing materials, would be made available to the defendant partnership for such advertising purposes; and that none of the above mentioned promises had been fulfilled. And as an additional ground of defense, the defendant partners alleged that the Ohmlac Paint and Refining Company, Inc., a corporation affiliated with the Carbozite company, which manufactured roofing materials of substantially the same texture as Carbozite roofing materials, had granted to the Feeders' Service Company, of Natchez, the exclusive right to sell Ohmlac roofing materials in the Natchez area, and that the sale of Ohmlac products in the trade territory covered by the defendants' franchise constituted a violation of the defendants' rights under the agreement entered into by and between the defendant corporation and the Carbozite Protective Coatings, Inc. The defendants alleged that the plaintiffs were well acquainted with

and the Mississippi Supreme Court affirmed:

> There was no error in the court's ruling on the plaintiffs' objection to the testimony offered by the defendants to prove that the Carbozite Protective Corporation, Inc., had agreed to send a trained salesman to Natchez equipped with special trucks and machinery designed to demonstrate the proper use and application of the Carbozite waterproof roofing materials, and that the Carbozite Protective Coatings, Inc., had agreed to conduct an intensive national and local sales and advertising campaign to stimulate sales of the Carbozite roofing materials. The trade acceptances sued on in the plaintiffs' declaration were issued in payment of the purchase price of 700 gallons of Carbozite waterproof roofing materials delivered to the defendant partnership under the terms of the written franchise agreement dated January 4, 1950, a copy of which the defendants attached to their answer. The purchase order for the 700 gallons of waterproof roofing materials was incorporated in the agreement. The agreement expressly provided that "Orders are not subject to countermand." And in the agreement it was expressly stated that "It is understood that this contract covers and includes the entire agreement between the parties and any changes binding upon the company must be incorporated in this contract. No warranty or conditions will be recognized unless specified in this contract."
>
> Each of the drafts sued on in this case contained a provision that "the transaction which gives rise to this instrument is the purchase of goods by the acceptor from the drawer."
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> The . . . promises which the defendants' attorney proposed to prove by J. W. Claughton were verbal promises to do certain acts in the future. The offer to prove such promises

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> the practice of the above mentioned corporations in granting overlapping franchises in the same territory for the sale of their respective products under different trade names, and the misrepresentations made by the Carbozite Protective Coatings, Inc., concerning the advertising campaign and large scale demonstration program which the Carbozite company proposed to conduct for the benefit of their retail dealers, and that the plaintiffs were not bona fide purchasers of the trade acceptances described in the plaintiffs' declaration.

Id. at 792-93.

[589] *Id.* at 793.

> was in effect an offer to vary and add to the terms of the written instruments by parol[] testimony; and the testimony was properly rejected for the reason.[590]

Finally, in *Houser v. Brent Towing Co.*,[591] Houser, who was injured while in the employ of Brent Towing, settled with Brent Towing and executed a release of liability which provided in part:

> [F]or and in consideration of the full sum of ONE HUNDRED THOUSAND AND NO/100 ($160,000.00) DOLLARS, . . . Jimmy Ray Houser and Gladys Vivian Houser do hereby release, and forever discharge Brent Towing Company, Inc., . . . from any and all rights, claims, causes of action liens or remedies of whatever kind or nature which he or she now has or hereinafter acquired for damages or expenses arising out of Jimmy Ray Houser's employment and injury with Brent Towing Company, Inc., . . . including past or future maintenance, cure or wages, or under any compensation statute, Federal or State, or under any contract or policy of insurance, and whether at law, in equity or in admiralty, an[d] whether the same be now known or hereafter discovered.[592]

When Houser later sued Brent Towing for unpaid medical bills, Brent Towing moved for summary judgment based on the release.[593] Houser answered the motion

> by arguing that despite the language of the written release, the parties had intended that Brent Towing Company would pay, in addition to the sum certain specified in the settlement, all maintenance and medical expenses incurred prior to the payment of the settlement funds. Attached to the response were, *inter alia*, an affidavit by Houser's attorney, the letters referred to above, and the outstanding medical bill for the percutaneous discetomy.[594]

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[590] *Id.*

[591] 610 So. 2d 363 (Miss. 1992).

[592] *Houser*, 610 So. 2d at 364.

[593] *Id.*

[594] *Id.* at 364-65.

The trial court granted Brent Towing's motion for summary judgment. The Mississippi Supreme Court affirmed:

> The question we must resolve is simple: Can Houser avoid the clear and unconditional language of the written release by introducing extrinsic evidence of a contrary intent? The August 13 release unequivocally discharges any and all "damages or expenses arising out of Jimmy Ray Houser's employment and injury with Brent Towing Company, Inc., . . . including past or future maintenance, cure or wages" in exchange for the $160,000.00 settlement. Houser maintains, however, that the June 11 and July 27 letters demonstrate that he intended to additionally hold Brent Towing Company responsible for the cost of his back surgery if the surgery occurred before Houser received the settlement proceeds.
>
> It is axiomatic that the terms of a clear and unambiguous writing may not be varied by parol evidence. When Houser signed the August 13 release, all prior agreements, including any evidenced by the letters to which Houser refers, were merged into the writing.[595]

1. *The Purpose of the Rule*

The "essence" of the parol evidence rule "is that the embodiment of an agreement into a single writing makes all other utterances of the parties on that topic legally immaterial for the purpose of determining what are the terms of the contract."[596]

Parties to a transaction should be able to clearly express their intent regarding the nature and scope of their legal relationship and be able to rely on the legal certainty of that expression. The purpose of memorializing an agreement is to definitely settle its terms and to exclude all oral understandings to the contrary. In the words of the Fifth Circuit:

> Both the parol evidence rule and the doctrine of integration exist so that parties may rely on the enforcement of agreements that have been reduced to writing. If it were not

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[595] *Id.* at 365 (citations omitted).

[596] Chism v. Omlie, 124 So. 2d 286, 288 (Miss. 1960).

> for these established principles, even the most carefully considered written documents could be destroyed by "proof" of other agreements not included in the writing. The importance of these principles is well established . . . in contract law generally. True, [contract] law recognizes a number of exceptions to the parol evidence rule. We believe, however, that these exceptions are carefully and narrowly crafted to permit a court to consider parol evidence only in certain well-defined circumstances. If it were otherwise, the exceptions would become the rule, and the general prohibition against parol evidence would cease to have any legal effect.[597]

2. *The Scope of the Rule*

The parol evidence rule applies only to controversies between the parties to the written agreement, the existence of which is the basis for invoking the rule.[598] As such, the rule may not be invoked by[599] or against[600] non-parties to the written agreement.

By its own terms, the parol evidence rule does not bar extrinsic evidence that is offered merely to explain, not to add to, contradict, vary or change, a written agreement.[601] Nor does the rule bar extrinsic evidence regarding collateral agreements,[602] subsequent oral or written agreements,[603] or writings that are "not contractual in nature."[604]

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[597] Jack H. Brown & Co. v. Toys "R" Us, Inc., 906 F.2d 169, 176 (5th Cir. 1990) (applying analogous Texas law).

[598] *See* Sullivan v. Estate of Eason, 558 So. 2d 830, 832 (Miss. 1990); Smith v. Falke, 474 So. 2d 1044, 1046 (Miss. 1985); National Cash Register Co. v. Webb, 11 So. 2d 205, 205 (Miss. 1942); *see also* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 347 (1971) (adopting rule that parol evidence rule is only operative as to parties to written agreement).

[599] *See, e.g., Falke*, 474 So. 2d at 1047; *National Cash Register*, 11 So. 2d at 205 (both holding that third parties seeking to invoke the rule to their benefit lack privity to and are unintended beneficiaries of contract; and, therefore, cannot invoke rule).

[600] *See, e.g., Sullivan*, 558 So. 2d at 832 (holding that named insured could not exclude evidence of separate agreement between named insured and her co-tenants regarding distribution of insurance proceeds by arguing that the insurance policy clearly and unambiguously provided that proceeds would be paid by insurer to named insured).

[601] *See infra* subpart III.A.2.a.

The rule does not apply in the absence of a written agreement.[605]

a. Explanatory Evidence

Parol evidence is admissible if offered merely to explain a written agreement.[606] Put another way: "Parol evidence is admissible to show the meaning which the parties themselves attached to words they themselves employed in their own written contract."[607]

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[602] *See infra* subpart III.A.2.b.

[603] *See infra* subpart III.A.2.c.

[604] Wilkins v. Bancroft, 193 So. 2d 571, 574 (Miss. 1966) (holding that oral testimony regarding letter did not invoke parol evidence rule because letter was merely proposal and "not contractual in nature").

[605] *See, e.g.*, Sloan v. Taylor Mach. Co., 501 So. 2d 409, 410 (Miss. 1987); *see also* Ludke Elec. Co. v. Vicksburg Towing Co., 127 So. 2d 851, 857 (Miss. 1961) ("Where a case is taken out of the Statute of Frauds, for any reason, parol evidence is properly admissible to prove the terms of the agreement."). The *Sloan* court stated:

> [W]here a person is not named in the written contract and parol evidence is necessary to show the existence of the contractual relationship, the contract is unwritten insofar as that person is concerned . . . .

Sloan, 501 So. 2d at 410 (quotation omitted). Moreover,

> [i]f parol evidence merely establishes the exact amount of money to be paid or physical specifications of work to be performed, the contract is written, but it is unwritten where the parol evidence establishes the basic existence of an obligation to pay or perform.

Id. at 411.

[606] *See* Keppner v. Gulf Shores, Inc., 462 So. 2d 719, 725 (Miss. 1985); Byrd v. Rees, 171 So. 2d 864, 867 (Miss. 1965); Valley Mills, Div. of Merchants Co. v. Southeastern Hatcheries of Miss., Inc., 145 So. 2d 698, 702 (Miss. 1962); Miles v. Miles, 30 So. 2, 3 (Miss. 1901); Shackelford v. Hooker, 54 Miss. 716, 719 (1877); Peacher v. Strauss, 47 Miss. 353, 361-63 (1872); *see, e.g.*, Swinny v. Cities Serv. Oil Co., 197 So. 2d 795, 798 (Miss. 1967) (holding that extrinsic evidence of oral agreement about amount of distributor's commission was not an effort to change or amend parties' written contract, notwithstanding presence of merger and no-oral-modification clause, when written contract contained provision that amount of any commissions owed distributor would be paid "as shall be agreed upon"); *Wilkins*, 193 So. 2d at 573-74 (holding that oral testimony to explain meaning of notation "Loan on 1/4 int. prop. located at NE corner Delaware & 6th 200 x 125 ft." on memo line of check did not violate parol evidence rule because the notation was ambiguous and the testimony was offered to explain, not contradict, the notation).

In the early case of *Kerl v. Smith*,[608] the issue for the court was the meaning of the word "timber" in the parties' contract. The plaintiff (Kerl) proffered testimony that "timber" meant "merchantable pine timber."[609] The trial court excluded the testimony, and the defendant (Smith) prevailed. On appeal, the Mississippi Supreme Court reversed:

> It was competent for the plaintiff to show what was meant by the word "timber" in this contract, and it was error for the court to exclude testimony offered for this purpose. The use of the word "timber" in the contract, with nothing to explain in the contract what kind of timber is meant, is not so accurate a designation of what was sold as to preclude investigation as to what was meant by it in this ambiguous contract. It was permissible for plaintiff to show what particular business he was engaged in and known to defendant, and what the common acceptation of the word "timber" meant in that business and at the place where he was conducting it. Such testimony is in no sense contradictory of the terms of the contract, but it is essential to explain its meaning, since the contract itself does not do that.[610]

In *Byrd v. Rees*,[611] the written contract recited, in part:

> It is the intention of all parties hereto that the business of the Credit Bureau of Hattiesburg Collection Service shall continue uninterrupted just as though there had been no change of

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[607] *Miles*, 30 So. 2, 3 (Miss. 1901). By the same rationale, extrinsic evidence, which might otherwise be excluded by operation of the parol evidence rule, may be admissible to explain or interpret technical terms used in a written agreement. *See, e.g.*, Mississippi State Hwy. Comm'n v. Dixie Contractors, Inc., 375 So. 2d 1202, 1205 (Miss. 1979). *See generally* 4 WALTER H.E. JAEGER, WILLISTON ON CONTRACTS § 613 (3d ed. 1961), and cases cited therein. "Technical terms and words of art [should be] given their technical meaning when used in a transaction within their technical field." RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(b) (1981).

[608] 51 So. 3 (Miss. 1910).

[609] *Kerl*, 51 So. at 3.

[610] *Id.* at 4.

[611] 171 So. 2d 864 (Miss. 1965).

> ownership and that such operation by the Buyer shall conform in general to the *plan of the operation heretofore in effect.*[612]

Examining this language, the court opined:

> What then was the "plan of operation heretofore in effect?" The contract itself does not indicate what is meant by "the plan of operation heretofore in effect." We are of the opinion that parol evidence could be introduced to explain the intention of the parties as to what operation had been in effect.[613]

In *Mississippi State Highway Commission v. Dixie Contractors, Inc.*,[614] the issue was the admissibility of evidence of agreed meanings and trade usages:

> We are of the opinion that much of the interpretative testimony which the highway commission tried unsuccessfully to introduce should have been admitted under the exception to the parol evidence rule which permits clarification of contract ambiguities by testimony showing agreed meanings between the parties or those common to the trade generally.
>
> . . . . A course of performance under the first segment, depicted in plan sheet 2-E, could be a material aid in construing the performance to be required under identical pay items on the 11.4-mile segment depicted in the plan sheet. Moreover, any competent evidence of trade usage should have been admitted to clarify, hopefully, the complex and somewhat ambiguous language used by the commission in the technical documents constituting the contract at issue.[615]

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[612] *Byrd,* 171 So. 2d at 868 (emphasis added).

[613] *Id.*

[614] 375 So. 2d 1202 (Miss. 1979).

[615] *Dixie Contractors*, 375 So. 2d at 1205 (citation omitted).

Addressing the argument that any ambiguity should be construed against the drafter, *see supra* subpart II.D.1, the *Dixie Contractors* court held:

> Dixie correctly states an abstract rule of law requiring that ambiguities in a written contract be resolved unfavorably to the party who drafted the contract. However, this rule may not be enlarged, as it seems to have been done, to exclude the drafting party's evidence aimed at clearing the ambiguity by showing reasonable commercial understandings, concerning the meanings of technical terms, arising from usage of trade

b. Evidence of Collateral Agreements

A contemporaneous collateral agreement, though it may affect the rights of the parties under the written contract, may be proven by extrinsic evidence if it is not inconsistent with the integrated contract.[616]

In the early case of *Green v. Booth*,[617] the parties entered into two agreements: a written option to purchase certain real property, and an oral agreement regarding the commission to be paid if the holder of the option arranged the sale of the property to someone else rather than buying it himself. The option holder (Booth) arranged the sale of the property and requested his commission from the owner (Green).[618] Green refused to pay the commission, and Booth sued Green. At trial Green asked the court to instruct the jury that any oral agreement was inadmissible to vary the terms of the written option contract.[619] The court refused, and the jury found for Booth. Green appealed. On appeal, the Mississippi Supreme Court upheld the trial court's refusal of the requested instruction on the ground that the proffered evidence did not violate the parol evidence rule:

> The suit of appellee to recover commissions for effecting the sale of the property mentioned in the pleadings is not based on the option contract, wherein appellee is given the right to buy the property for the sum of $6,000 cash, or $6,500, one-half cash and the balance in two equal annual payments, with 8 per cent. interest, but on an oral contract to

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or a course of performance.

Id. at 1205-06 (citation omitted).

[616] *See, e.g.*, Knight v. McCain, 531 So. 2d 590, 595-96 (Miss. 1988); Universal Computer Servs., Inc. v. Lyall, 464 So. 2d 69, 76 (Miss. 1985); Valley Mills, Div. of Merchants Co. v. Southeastern Hatcheries of Miss., Inc., 145 So. 2d 698, 702 (Miss. 1962); Chism v. Omlie, 124 So. 2d 286, 288-89 (Miss. 1960); *see also supra* notes 100, 103-09 and accompanying text for additional discussion of collateral agreements.

[617] 44 So. 784 (Miss. 1907).

[618] *Green*, 44 So. at 784.

[619] *Id.*

> pay 5 per cent. commissions for effecting the sale of the property. These two contracts are wholly independent of each other, and to allow proof of the oral contract to pay 5 per cent. commissions for effecting the sale of the property in no way affects the written option contract; nor does it add to, alter, or in any way vary its terms. The written contract is complete in itself, and gives Mr. Booth the right to buy the property for a certain stipulated price. In establishing the oral contract to pay 5 per cent. commissions for effecting the sale of the property, the rule against the admission of parol testimony to contradict or vary the written instrument is no way invaded, because this is not the effect or object of the testimony.[620]

In *Universal Computer Services, Inc. v. Lyall*,[621] the parties had a written employment contract "covering duties of employment, non-competition restrictions, etc., but which did not cover [the employee's] remuneration."[622] The employee proffered extrinsic evidence regarding, *inter alia*, a sales plan and commissions.[623] The employer argued that the evidence should be excluded because it "tend[ed] to prove the existence of an employment agreement in lieu of the employment agreement itself."[624] The Mississippi Supreme Court disagreed:

> [T]he employment contract . . . did not address salary or commission . . . . It therefore follows that the employment agreement is not the entire contract between the parties and therefore the chancellor was correct in admitting other evidence to evince the total agreement . . . .[625]

A collateral agreement must be independent of and collateral to the written agreement and not such that the parties might reasonably expect it to be merged in the final writing.[626] Such an agreement, to be performed after the contract is executed, is not merged into the written contract.[627]

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[620] *Id.*

[621] 464 So. 2d 69 (Miss. 1985).

[622] *Lyall*, 464 So. 2d at 71.

[623] *Id.*

[624] *Id.* at 76.

[625] *Id.*

[626] Knight v. McCain, 531 So. 2d 590, 596 (Miss. 1988).

In *Knight v. McCain*,[628] the McCains agreed to purchase from Johnson certain real property on which to build a house. Furthermore,

> [b]ased upon information that building permits could not be secured on this particular property, the McCains secured from Johnson an amendment to the contract, or an independent stipulation, that if a building permit could not be obtained their purchase price would be refunded. Since the purpose of buying this property was for residence construction, the inability to secure a building permit eliminates the purpose for which the conveyance was executed.[629]

Citing cases from thirty-seven jurisdictions recognizing an exception to the merger doctrine for collateral agreements "to be performed subsequent to the conveyance" (and from three other jurisdictions not recognizing such an exception),[630] the *Knight* Court adopted the majority view and held, therefore, that "[t]he independent and collateral agreement was enforceable between the McCains and Johnson."[631]

c. *Evidence of Subsequent Agreements*

The parol evidence rule does not apply to oral or written agreements made between some or all of the same parties after the parties executed the prior written agreement[632]—provided that the subsequent agreement is supported by separate consideration[633] and satisfies the other requisites to be a valid contract.[634] Extrinsic evidence may be admitted to prove a subsequent oral or written agreement "although it may alter or abrogate" the prior written agreement.[635]

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[627] *Id.* at 595.

[628] 531 So. 2d 590 (Miss. 1988).

[629] *Knight*, 531 So. 2d at 596.

[630] *See id.* at 595 & n.1.

[631] *Id.* at 595.

[632] *See* Iuka Guar. Bank v. Beard, 658 So. 2d 1367, 1372 (Miss. 1995); Bell v. Hill Bros. Constr. Co., 419 So. 2d 575, 576-77 (Miss. 1982); *see, e.g.*, Kelso v. McGowan, 604 So. 2d 726, 731 (Miss. 1992) ("Since the writing whereby Pollack agreed to guarantee the Eastover loan was executed prior to Kelso's promise to pay an additional $10,000, the parol evidence rule does not apply to the parties' agreements relating to the Eastover loan."); Ham v. Cerniglia, 18 So. 577, 578 (Miss. 1895) ("The excluded evidence was offered to show that there was an agreement of the parties, made after the sale of the first items of furniture, . . . by which it was understood between the parties that the payments from time to time were to be entered as credits generally upon the entire account of the pur-

In *Iuka Guaranty Bank v. Beard*,[636] the plaintiff (Beard) and her former husband, in November 1982, jointly borrowed $46,512.31 from Iuka Guaranty Bank:

> Previous notes to Iuka in the sum of $1,300 and $15,000 were consolidated into the balance of this new note on the advice of Gene Jourdan, a banker at Iuka Guaranty since 1962, who noted that [Mr. Beard] had been having difficulty making payments on previous loans. The Beards signed two deeds of trust as security for the 1982 loan. . . . Both of these deeds of trust contained a "dragnet clause" asserting that the instruments secured not only the principal scheduled debt, but also any other separate or joint indebtedness owed to Iuka by either party.[637]

The deeds of trust covered two lots—"Lot 7," on which the Beards' house stood, and "Lot 44," a vacant parcel in the same development.[638]

In 1985, having been notified by Iuka that it was considering foreclosure, Beard obtained a loan of $38,000 in her own

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chaser, and not upon any particular items in any particular purchase. This evidence was admissible. It did not vary or alter the written agreement. Its purpose was to show the whole contract of the parties . . . .").

[633] *See Iuka Guaranty Bank*, 658 So. 2d at 1372; Edrington v. Stephens, 114 So. 387, 389 (Miss. 1927).

[634] *See* Singing River Mall Co. v. Mark Fields, Inc., 599 So. 2d 938, 947 (Miss. 1992).

[635] Sammons Communications, Inc. v. Polk, 429 So. 2d 564, 567 (Miss. 1983); *see Iuka Guaranty Bank*, 658 So. 2d at 1371-72; Renfroe v. Aswell, 21 So. 2d 812, 813 (Miss. 1945); Lee v. Hawks, 9 So. 828, 828 (Miss. 1891); *see also* Housing Auth., City of Laurel v. Gatlin, 738 So. 2d 249, 259 (Miss. 1998) (Diaz, J., dissenting). See *infra* subparts III.B.12.a & III.B.12.d for discussions of the related topics of subsequent oral modification and rescission, respectively.

[636] 658 So. 2d 1367 (Miss. 1995).

[637] *Iuka Guar. Bank*, 658 So. 2d at 1369.

[638] *Id.*

name from Fidelity Federal Savings and Loan, giving First Fidelity a deed of trust on Lot 7, and forwarded the entire amount to Iuka in full satisfaction of the outstanding balance on the November 1982 loan.[639] The plaintiff

> testified that before they satisfied the loan, Jourdan assured them that he would immediately cancel the deeds of trust on Lot 7 and Lot 44 upon payment. She claimed that Jourdan repeated his guarantees that they had successfully fulfilled all of their obligations to Iuka necessary to release the two deeds of trust. She testified that Jourdan made no mention of any other debts preventing Iuka from releasing both deeds of trust. Though the Beards paid the entire balance of the loan on August 23, 1985, Jourdan testified that the bank would have been equally content had the Beards merely tendered their overdue payments. Jourdan said he canceled the Lot 7 deed of trust on the day following full payment of the 1982 loan.[640]

In 1990, Beard, who had since divorced, received a notice of foreclosure from Iuka on Lot 44.[641] Beard wrote Jourdan, requesting that the deed of trust on Lot 44 be released. Jourdan denied the request and carried out the foreclosure.[642]

Beard sued Iuka for breach of contract in failing to cancel the deed of trust on Lot 44 and improperly exercising the dragnet clause contained in the deed of trust.[643] Beard prevailed at trial. Iuka appealed, arguing that the deed of trust containing the dragnet clause unambiguously entitled Iuka to foreclose on Lot 44 due to Mr. Beard's failure to satisfy debts subject to the dragnet provision.[644] The Mississippi Supreme Court affirmed

> because the evidence [Beard] provided the jury was never contradicted or discredited by the defense. The uncontradicted

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[639] *Id.* at 1369-70.
[640] *Id.* at 1370.
[641] *Id.*
[642] *See id.*
[643] *Id.* at 1369.
[644] *Id.* at 1371.

> evidence sufficiently demonstrated that if Beard repaid the $46,000 loan extended in 1982, then Iuka would cancel the deed of trust on Lot 7 and Lot 44 . . . .
>
> While there was sufficient evidence demonstrating a subsequent agreement between Iuka and Beard, consideration must exist to make it legally binding on Iuka . . . . Faced with the possible foreclosure of Lot 44, Beard prematurely paid the balance of the $46,512.31 loan to Iuka in full. Regardless of how Beard was able to obtain the funds to pay the entire balance due, we find that the act of prematurely satisfying her debt to Iuka was a legal detriment sufficient to enforce the subsequent agreement which the jury found existed between Nancy and Iuka.[645]

3. *General Application of the Rule*

Additionally, parol evidence should be admissible in the following circumstances:

a. *Partially Integrated, Unambiguous Agreements*

If the writing is not the final and complete agreement of the parties as to one or more terms, parol evidence may be admitted to add to, clarify, explain, or give meaning to the writing[646]—but only insofar as the evidence does not vary or contradict those terms of the writing that *are* complete and final.[647]

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[645] *Id.* at 1371-72 (citations omitted).

[646] *See* Keppner v. Gulf Shores, Inc., 462 So. 2d 719, 725 (Miss. 1985); Carter v. Collins, 117 So. 336, 338 (Miss. 1928); *see also* Walley v. Bay Petroleum Corp., 312 F.2d 540, 543-44 (5th Cir. 1963) (applying Mississippi law) ("The parol evidence rule does not preclude the introduction of evidence showing a prior or contemporaneous agreement if the writing, or writings, constitute only a partial integration of the agreement between the parties. That is, if the writings are but a partial integration of the agreement, the rest of the agreement, or collateral agreements, may be shown through parol." (footnote omitted)).

[647] *See* J.O. Hooker & Sons, Inc. v. Roberts Cabinet Co., 683 So. 2d 396, 400 (Miss. 1996); Busching v. Griffin, 542 So. 2d 860, 865 (Miss. 1989); *Carter*, 117 So. at 338; *see also* Seitz v. Brewers' Refrigerating Mach. Co., 141 U.S. 510, 517 (1891) (holding that parol evidence cannot be used to vary one of written terms of partially integrated document where particular term is "complete and perfect on its face, without ambiguity"); Walley v. Bay Petroleum Corp., 312 F.2d 540, 545 n.9 (5th Cir. 1963) (applying Mississippi law) ("Even in situations in which

In *Keppner v. Gulf Shores, Inc.*,[648]

> the Omelette Shoppe, Inc., Wen Coast-Wendelta, Inc., and Gulf Shores, Inc., owned properties contiguous to one another which properties were located on the west side of U.S. Highway 49 in Gulfport. The Omelette Shoppe, Inc., and Wen Coast-Wendelta, Inc. (Wendy's) each planned to build and operate a fast food restaurant, and Gulf Shores, Inc., planned to build and operate a 150 room motel, restaurant, lounge, swimming pool and related facilities under a franchise from Holiday Inns of America.
>
> The parties were aware that sewage collection and disposal would be required for the operations of their respective facilities, and jointly agreed to build such facility which consisted of collection lines from each of their properties to a lift station with all necessary pumps, electrical circuits and controls, and a discharge line from such lift station to a sewage collection system which had been jointly built by the City of Gulfport and Harrison County in an unincorporated area located north of the city.
>
> The parties also agreed to construct and operate a water main from such system built by Gulfport and Harrison County which would serve each of their properties.
>
> This agreement was incorporated into a document dated November 11, 1979, and provided *inter alia*, that the parties would construct a 4 inch water and force main along with a

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the writings are but a partial integration of the agreement, that part of the agreement which is reduced to writing cannot be contradicted by parol.").

For example:

> If a contract provides in writing for a term of "Ten years from date" but is silent as to salary, the salary could be supplied by parol—but the term for which the salary is to be paid could not be shown to be something inconsistent with the ten years . . . . Although under certain conditions parol evidence may be used to supplement a partially written but unintegrated contract, such testimony cannot disintegrate the unimpeachable portions of the written partial integration. An unintegrated written contract having a positive element or term cannot be negatived by parol proof of a contradictory and inconsistent positive that was existent before the writing was signed.

Matthews v. Drew Chem. Corp., 475 F.2d 146, 150 (5th Cir. 1973) (applying analogous Florida law).

[648] 462 So. 2d 719 (Miss. 1985).

> lift station according to plans drawn by T.L. Reynolds at a cost of $50,425.00. The water was to be separately metered, and all maintenance costs of the system were to be divided equally by the original owners and any subsequent users.[649]

Sometime after this sewage and water agreement was signed, the Omelette Shoppe went bankrupt.[650] The property was eventually purchased by Shular, who owned the Sheraton Inn adjoining the Omelette Shoppe property.[651] When a dispute subsequently arose regarding the Sheraton's use of the sewage treatment plant originally shared by Wendy's, Gulf Shore, and the Omelette Shoppe, the trial court permitted Gulf Shore's vice president to testify that the objective of the agreement was to provide a sewage treatment facility which would service two fast-food restaurants and one motel, and that the parties understood that the Holiday Inn would use more capacity than the two restaurants.[652]

Shular argued on appeal that this evidence was improperly admitted in violation of the parol evidence rule.[653] The supreme court disagreed:

> The parol evidence rule has no application where the writing is incomplete, ambiguous or where the evidence is not offered to vary the terms of the written agreement.
>
> In the case sub judice the agreement between the Omelette Shoppe, Wendy's and Gulf Shores is silent on the subject of the relative use of the sewage treatment system by the parties. Therefore, the admission of testimony regarding the matter does not violate the parol evidence rule.[654]

In *Fortune Furniture Manufacturing, Inc. v. Pate's Electronic Co.*,[655] the written contract between the parties did not specify the time by which the plaintiff (Pate) was to perform.[656] However, the defendant (Fortune) testified that Pate had orally promised at the time the written agreement was made that he would perform within 30 days.[657] The Mississippi Supreme Court reversed the trial court's ruling prohibiting the jury from considering Fortune's testimony about the oral agreement. The court stated

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[649] *Id.* at 721.

[650] *Id.*

[651] *Id.*

[652] *Id.* at 725.

[653] *Id.*

[654] *Id.* (citations omitted).

[655] 356 So. 2d 1176 (Miss. 1978).

> [t]he general rule is that what is a reasonable time for performance when there is no time specified in the contract is a question of law for the court. The general rule is that what is a reasonable time for performance when there is no time specified in the contract is a question of law for the court. However, in this case the appellant pled and Sidney Whitlock, its president, testified that at the time he signed Pate's proposal, M. L. Pate told him that the system would be installed within thirty days . . . .
>
> Since the question whether the written contract was the final and complete expression of the agreement between the parties can be decided only on the basis of the evidence and since the evidence in this case was conflicting, it is clear that a jury issue was presented as to whether Pate had contracted to complete installation of the system within thirty days.[658]

b. *Integrated, Ambiguous Agreements*

If the fully or partially integrated writing is ambiguous, parol evidence may be admitted to clear up the ambiguity,[659] but may not vary or contradict those integrated terms that are unambiguous.[660]

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[656] *Fortune Furniture*, 356 So. 2d at 1177.

[657] *Id.*

[658] *Id.* at 1178 (citations omitted).

[659] *See* Kight v. Sheppard Bldg. Supply, Inc., 537 So. 2d 1355, 1358 (Miss. 1989) ("Where, as here, the writing is ambiguous, courts are obligated to pursue the intent of the parties by resort to parol evidence."); Cherry v. Anthony, Gibbs, Sage, 501 So. 2d 416, 419 (Miss. 1987) ("Parol evidence as to surrounding circumstances and intent may be brought in where the contract is ambiguous . . . ."); *Keppner*, 462 So. 2d at 725; Baylot v. Habeeb, 147 So. 2d 490, 494 (Miss. 1962) ("Whenever . . . an ambiguity arises . . . parol evidence may be introduced to show what was in the minds of the parties at the time of making the contract."), *modified on other grounds*, 149 So. 2d 847 (Miss. 1963); *see also* IP Timberlands Operating Co. v. Denmiss Corp., 726 So. 2d 96, 104, 110 (Miss. 1998); Century 21 Deep South Properties, Ltd. v. Keys, 652 So. 2d 707, 716-17 (Miss. 1995); Dennis v. Searle, 457 So. 2d 941, 945 (Miss. 1984); Barnett v. Getty Oil Co., 266 So. 2d 581, 586 (Miss. 1972); Byrd v. Rees, 171 So. 2d 864, 867 (Miss. 1965).

In *Traders' Insurance Co. v. E.D. Edwards Post No. 22, G.A.R.*,[661] the insurance policy included two statements of duration—"for the term of three years" and "from the fourteenth day of January, 1903, at noon, to the fourteenth day of January, 1904, at noon."[662] Finding each statement to be "perfectly clear in itself, but . . . mutually inconsistent and contradictory," the Mississippi Supreme Court found that the trial court

> erred in not permitting the introduction of parol evidence to show which of the two periods named in the policy was the one in contemplation of the parties. Parol evidence is admissible in such a case, not to vary the contract, nor to make a contract for the parties, but to make clear what the contract really was.[663]

In *Hattiesburg Plumbing Co. v. A.E. Carmichael & Co.*,[664] the contract in question called for the provision of an "artesian well."[665] Unable to afford an unambiguous "plain meaning" construction to the term, the Mississippi Supreme Court approved the use of parol evidence:

> The primary definition in all the dictionaries of the word "artesian" indicates a well from which the water flows natu-

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Indeed, the Mississippi Supreme Court and the Mississippi Court of Appeals have both stated that, upon a finding of ambiguity, the trier of fact *must* resort to extrinsic evidence. *See, e.g., Century 21*, 652 So. 2d at 716-17; *Barnett*, 266 So. 2d at 586; Freeman v. Greenville Convalescent Home, Inc., No. 96-CA-00466-COA, 1998 WL 881772, at *5 (Miss. Ct. App. Dec. 18, 1998).

[660] *See* Busching v. Griffin, 542 So. 2d 860, 865 (Miss. 1989) (holding that the fact that the parol evidence rule does not bar extrinsic evidence "where the writing is incomplete, ambiguous or where the evidence is not offered to vary the terms of the written agreement" means "at most . . . that parol evidence is admissible on those points where there is ambiguity" and, therefore, "[s]uch evidence may not be received to contradict parts of the option that are not ambiguous").

[661] 38 So. 779 (Miss. 1905). See *supra* notes 35-38 and accompanying text for more discussion of this case.

[662] *Traders' Ins.*, 38 So. at 779.

[663] *Id.*

[664] 31 So. 536 (Miss. 1901).

[665] *Hattiesburg Plumbing*, 31 So. at 536.

> rally without artificial pressure; but the secondary definition of this word in the Century and Standard Dictionaries and others seems to indicate that it may be applied, also, to wells from which the water is made to flow by artificial means. The word "artesian," therefore, becomes a term of equivocal significance, standing unexplained in a contract. It was hence competent to introduce parol testimony to show what meaning it had in this particular contract. The court consequently erred in excluding this testimony. It should receive all parol testimony showing what meaning this word "artesian" had, as used by the parties to this contract.[666]

The Mississippi Supreme Court has repeatedly approved the resort to extrinsic evidence in cases involving latent ambiguity,[667] but has charted a somewhat more winding path on the admissibility of parol evidence to resolve patent ambiguities.[668]

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[666] *Id.* at 537.

[667] *See, e.g.*, Tinnin v. First United Bank of Miss., 570 So. 2d 1193, 1195 (Miss. 1990); Claughton v. Leavenworth, 37 So. 2d 776, 777-78 (Miss. 1948); Butler v. R.B. Thomas & Co., 116 So. 824, 824-25 (Miss. 1928); Miles v. Miles, 30 So. 2, 3 (Miss. 1901); Hanna v. Renfro, 32 Miss. 125, 129-30 (1856). See *supra* notes 34, 42-45 and accompanying text for further discussion of "latent" ambiguity.

[668] *Compare, e.g.*, Seal v. Anderson, 108 So. 2d 864, 866-67 (Miss. 1959); Sack v. Gilmer Dry Goods Co., 115 So. 339, 340 (Miss. 1928); Haughton v. Sartor, 15 So. 71, 71 (Miss. 1894) (all holding that patent ambiguity in deed cannot be resolved by parol evidence) *with, e.g.*, Sunnybrook Children's Home, Inc. v. Dahlem, 265 So. 2d 921, 924 (Miss. 1972); Smalley v. Rogers, 100 So. 2d 118, 120 (Miss. 1958) (both holding that parol evidence was admissible to address patent ambiguity in suit to reform ambiguous instrument); Carlisle v. Carlisle's Estate, 252 So. 2d 894, 895-96 (Miss. 1971) (holding that parol evidence was admissible to resolve meaning of "home" in will); Ham v. Cernigilia, 18 So. 577, 578 (Miss. 1895) (holding that parol evidence was admissible to resolve patent ambiguity regarding point at which "lease" payments would terminate and status of title to "leased" goods after payments equaling full value of goods were made). See *supra* notes 33, 35-41 and accompanying text for further discussion of "patent" ambiguity.

c. *Unintegrated Agreements*

If the writing is not the final and complete agreement of the parties as to its terms, the parol evidence rule does not apply.[669]

4. *The Parol Evidence Rule Is a Rule of Substantive Law, Not a Rule of Evidence*

The parol evidence rule is "not merely a rule of evidence, but is one of substantive law,"[670] which "is foremost a rule that prescribes conditions for the exercise of powers other law confers upon" the parties to the written contract.[671] Because the parol evidence rule is a matter of substantive law, a federal court sitting in diversity or another state's court hearing a dispute over a Mississippi contract, will apply the parol evidence rule in accordance with Mississippi law.[672]

5. *Invoking the Parol Evidence Rule*

A party may not successfully raise the parol evidence rule for the first time on appeal.[673] A party seeking to exclude evidence based on the parol evidence rule must object to its consideration before the trial court enters its judgment.[674]

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[669] *See* Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 547 (Miss. 1969) ("[T]he parol evidence rule does not become applicable unless there is an integration of the agreement, that is, unless the parties have assented to a certain writing as a [complete and accurate] statement of the agreement between them."); *see also* Fortune Furniture Mfg., Inc. v. Pate's Elec. Co., 356 So. 2d 1176, 1178 (Miss. 1978) ("[P]rior and contemporaneous negotiations are merged only into the writings that are adopted by the parties as the final and complete expression of their agreement.").

[670] Kendrick v. Robertson, 111 So. 99, 101 (Miss. 1927); *accord* Cooper v. Crabb, 587 So. 2d 236, 241 (Miss. 1991); Security Mut. Fin. Corp. v. Willis, 439 So. 2d 1278, 1281 (Miss. 1983); Fuqua v. Mills, 73 So. 2d 113, 119 (Miss. 1954); Edrington v. Stephens, 114 So. 387, 389 (Miss. 1927); Housing Auth., City of Laurel v. Gatlin, 738 So. 2d 249, 251 (Miss. Ct. App. 1998). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 213 cmt. a, at 129 (1981).

[671] *Cooper*, 587 So. 2d at 241.

[672] *See supra* note 5.

[673] *See* Service Fire Ins. Co. v. Craft, 67 So. 2d 874, 876 (Miss. 1953); *accord* Estate of Parker v. Dorchak, 673 So. 2d 1379, 1384 (Miss. 1996).

[674] *Estate of Parker*, 673 So. 2d at 1384. The court explained:

6. *Summary Judgment Considerations*

The interpretation of a written agreement becomes an issue for the trier of fact only when there remains a genuine uncertainty as to which of two (or more) meanings is proper.[675] If the contract is worded so that it can be given a certain and definite meaning, it is not ambiguous; therefore, a trial court may construe it as a matter of law, "even though the parties disagree regarding the meaning and import of [its] terms."[676] In such a case, summary judgment on the contract is proper, even though the provisions of the contract are "not perfectly clear."[677] On the other hand, when a contract contains an ambiguity, summary judgment is improper because the interpretation of the ambiguous instrument becomes a fact issue.[678]

> Given that the Parol Evidence Rule is a rule of substantive law, a party should not lose the right to claim the benefit of said law merely because he failed to make a contemporaneous objection at the time the evidence was offered. We thus hold that, so long as evidence violative of the Parol Evidence Rule is properly objected to prior to the consideration of said evidence by the trier of fact, such evidence should properly be disregarded by said trier of fact in accordance with the law. In the case of a trial by jury, a limiting instruction instructing the jury to disregard said evidence should be granted by the trial judge on proper motion prior to the submission of the case to the jury. In the context of the present case, the objection to the testimony of Dorchak was made prior to the consideration of such testimony by the Chancellor as trier of fact in his Supplemental Opinion and Ruling and was thus timely.

Id. But see Kelso v. McGowan, 604 So. 2d 726, 730 n.4 (Miss. 1992) (McRae, J.) ("[S]ince the parol evidence rule is substantive, it prevails even in the absence of objection." (quoting—and apparently misapplying—*Edrington*, 114 So. at 389)).

[675] *See supra* subpart II.A.3.

[676] Shaw v. Burchfield, 481 So. 2d 247, 252 (Miss. 1985).

[677] *Id.*; *see* Smith v. First Fed. Sav. & Loan Ass'n of Grenada, 460 So. 2d 786, 790 (Miss. 1984).

[678] *See* Ellis v. Powe, 645 So. 2d 947, 952-53 (Miss. 1994) ("[W]here the contract is ambiguous and its meaning uncertain, questions of fact are presented which are to be resolved by the trier of facts after plenary trial on the merits."); Shelton v. American Ins. Co., 507 So. 2d 894, 896 (Miss. 1987) ("[W]here a contract is ambiguous . . . questions of fact are presented . . . and the granting of summary judgment is inappropriate."); *Shaw*, 481 So. 2d at 252 ("[W]e take a dim view of the practice of resolving contract ambiguities via summary judgment."); Dennis v. Searle, 457 So. 2d 941, 945-46 (Miss. 1984) ("The interpretation

For example, in *Dennis v. Searle*,[679] the Mississippi Supreme Court was presented with a contract that provided, in relevant part: "Sale conditioned on . . . house free of termites based on certificate of pest control concern acceptable to purchaser and termite damage repaired."[680] Reversing the chancery court's summary judgment in favor of the seller of the house, the court reasoned:

> There are any number of "ambiguities" in this language. On the one hand, this language may arguably be construed to mean that "house free of termites" is an absolute condition precedent to the obligation of Dennis to purchase the house and that the "certificate of pest control concern" is merely a procedural mechanism for determining when the sale should be closed. On the other hand, it may be argued that the contract means that the acceptance of a termite certificate by Dennis binds him and does not, under the language of the agreement, permit him any relief if he subsequently finds that the information contained in the termite certificate was inaccurate.
>
> . . . .
>
> Finally, the language in the agreement "termite damage repaired" is susceptible of the construction that the Searles remained obligated to repair any termite damage existing at the time of closing, period. Those three words could reasonably be read as meaning that any termite infestation or damage existing at the time of closing would be the Searles' responsibility, even though not disclosed in the infestation report. It cannot be said that the agreement expressly provides that the damage must be discovered and that Dennis on pain of waiver, must insist upon its repair before closing.
>
> These musings are not intended to suggest the final and

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of an unclear contract generally involves questions of fact sufficient so that our summary judgment procedure will be an inappropriate vehicle for final decision."); *see also* Southern Natural Gas Co. v. Pursue Energy, 781 F.2d 1079, 1081 (5th Cir. 1986) ("[A] district court may properly grant summary judgment when a contract is unambiguous, but may not grant summary judgment when a contract is ambiguous and the parties' intent presents a genuine issue of material fact." (citations omitted)) (applying Mississippi law).

[679] 457 So. 2d 941 (Miss. 1984).

[680] *Dennis*, 457 So. 2d at 945.

> authoritative construction of this agreement and language in question. They are presented as undergirding for our conclusion that, as a matter of law, the language employed in the agreement is ambiguous. Having in mind that, on a summary judgment procedure, the evidence must be viewed in the light most favorable to the party against whom the motion has been made, we have merely tried to demonstrate that there are reasonable constructions of the language of the agreement favorable to the Searles. Because of these, we find the document ambiguous and its proper construction to present questions of fact which ought not to have been determined on summary judgment.[681]

In *Taylor Machine Works, Inc. v. Great American Surplus Lines Insurance Co.*,[682] the question for the court was whether a letter written by a deceased worker's employer (ITS) to the manufacturer of the fork-lift (Taylor) involved in the employee's death, notifying the manufacturer of the accident involving the employee (Dacquisto), constituted a "claim" under the manufacturer's "claims-made" liability insurance.[683] Taylor's policy with its insurer (Great American)

> defined claim as "a notice received by the insured of an intention to hold the insured responsible for an occurrence involving the insurance provided under this policy, and shall include the service of suit or institution of arbitration proceedings against the insured."[684]

Taylor received ITS's letter on or about December 8, 1986. Dacquisto's heirs did not file suit against Taylor until 1987. When Taylor sought to have Great American treat the Dacquisto claim as having been made in 1986 (Taylor having exhausted its 1987 policy limit on another claim), Great American refused, and Taylor sued.[685] Great American moved for and received summary judgment on the grounds that, *inter*

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[681] *Id.* at 945-46.

[682] 635 So. 2d 1357 (Miss. 1994).

[683] *Taylor Mach. Works*, 635 So. 2d at 1361.

[684] *Id.* at 1359.

[685] *Id.*

alia, the December 8, 1996 letter from ITS to Taylor was not a "claim" as defined by the Taylor policy.[686] The Mississippi Supreme Court reversed, finding summary judgment inappropriate under the circumstances:

> The question of whether the December 8 letter was a claim or not, following the definition under the contract, was subject to the context in which the letter was written, the intent of the letter writer, the understanding of the parties, etc. Therefore, since this is a vital fact issue, and the parties' evidence is in dispute as to what the letter meant and also as what the policy meant to be a "claim," summary judgment was improper. The trier of fact should determine whether the letter reveals an intention to hold Taylor responsible for the damages.[687]

In *Lowery v. Guaranty Bank & Trust Co.*,[688] the decedent (Lowery)

> acquired credit life insurance for a term of 104 days (June 19, 1984 to October 1, 1984) on the $9,000.00 note, and for a term of 244 days (from February 14, 1984 to October 1, 1984) on the $2,000.00 note. The record clearly indicates that the credit life insurance terminated with the maturity date of the notes.[689]
>
> The policy included the following "grace period benefit:"
>
>> Grace Period Benefit: In addition to the death benefit for reducing life insurance as provided in the Death Benefit Provision, the Company will pay an additional benefit to the Creditor Beneficiary of an amount, if any, that the unpaid balance of the loan at the date of death exceeds the death benefit, except that the amount of such additional benefit shall not exceed two (2) times the uniform monthly decrease as defined in the Death Benefit Provision. No Grace Period Benefit will be paid if death occurs sixty (60) or more days after the expiration

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[686] *See id.* at 1359-60.
[687] *Id.* at 1361 (citations omitted).
[688] 592 So. 2d 79 (Miss. 1991).
[689] *Lowery*, 592 So. 2d at 82.

> of the term of insurance.
>
> On Level Life Insurance, the Company will pay the death benefit if the Insured Debtor should die within seven (7) days after the expiration of the term of the insurance and the insured loan is unpaid and outstanding as of the date of death.[690]
>
> Thus, where the credit life insurance death benefit is "reducing life," the grace period for reducing life insurance is 60 days. If the death occurs within 60 days of the expiration of the insurance, the death benefit will still be paid. The grace period for "level life" is seven (7) days, i.e., the death benefit is paid if the insured debtor dies within seven (7) days of the expiration of the term of the insurance.[691]

If the type of credit life coverage on each note had been clear, the trial court might well have been correct in granting summary judgment. Such was not the case:

> Assuming that Mr. Lowery owned the "reducing life" form of credit life insurance, then he had 60 days of additional coverage from the expiration of the insurance. Mr. Lowery's death occurred well within that 60 day period and the insurance would pay both notes. However, if he had "level life," the insurance would not cover the notes. Mr. Lowery would have only had a seven day grace period and his death was beyond that period for both notes.
>
> There is no indication from the notes whether the credit life insurance on the Lowery notes was "reducing life" or "level life," so there is no indication as to which grace period applies to Mr. Lowery's death. Treating the insurance as "reducing life" places the Lowerys within the 60 day grace period. Treating it as "level life" excludes the Lowerys . . . .
>
> There is a material issue of whether the Lowerys fit within one of the grace periods, and whether coverage by [Defendant] is available to the Lowerys even after the insurance expired.[692]

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[690] *Id.*

[691] *Lowery*, 592 So. 2d at 82.

[692] *Id.* (citation omitted).

The *Lowery* court passed (twice) on the chance to "stick it" to the defendant

B. Common Law Exceptions to the Parol Evidence Rule

> *It is always allowable to show that the instrument sued on was never valid, either for fraud or illegality, or want of consideration, or for failure of some condition on which the instrument was to take effect; or that, having been valid, from something occurring subsequently, it has ceased to be operative wholly or partially. It is not admissible to vary the terms of a valid written instrument by parol; but it is allowable to attack the instrument, and seek to overthrow it as never valid or having ceased to be . . . . The former cannot be altered by parol. The latter may be.*[693]

The parol evidence rule is "subject to many exceptions" and "very flexible."[694] The exceptions discussed in this subpart are roughly organized into two groups: (1) exceptions relating to the validity or enforceability of the writing at the time the contract was formed;[695] and (2) exceptions relating to the validity or enforceability of the written contract at the time of the alleged breach or at the time declaratory judgment was sought.[696]

If one or more of the following exceptions applies, the parol evidence rule will not bar the introduction of extrinsic evidence

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insurer. *Id.* First, the court remarked that "[a]mbiguities in an insurance contract are resolved in favor of the insured" but then declined to so construe the apparent ambiguity in this case as to what kind of grace period benefit Lowery contracted for. *Id.* Second, the court then noted that it has "in the past held that credit life insurance such as that taken out by the Lowerys may be 'reducing life' insurance and the grace period applied" but again declined to so hold in this case. *Id.* Put them together, and you have to wonder whether the "contra insurer" rule, *see supra* subpart II.E.4, is weaker than it used to be.

[693] Cocke v. Blackbourn, 57 Miss. 689, 691 (1880).

[694] Byrd v. Rees, 171 So. 2d 864, 867 (Miss. 1965). *See* Valley Mills, Div. of Merchants Co. v. Southeastern Hatcheries of Miss., Inc., 145 So. 2d 698, 702 (Miss. 1962). *See generally* HUNTER, *supra* note 5, §§ 7:12-7:17.

[695] *See infra* subparts III.B.1-.7.

[696] *See infra* subparts III.B.7-.12. (The consideration topics overlap the two categories—thus, II.B.7 is included in both lists).

to explain, expand, or modify the written provisions of an otherwise integrated and unambiguous contract.

1. Fraud

The parol evidence rule does not bar extrinsic evidence that the party offering the evidence was fraudulently induced to enter into the written agreement[697]—even if the agreement states that the parties thereto are relying solely on his or her own knowledge and not on any representations by the other party that are not included in the writing.[698]

Extrinsic evidence may also be admissible to show "fraud of the draftsman"—*i.e.*, that the drafting party fraudulently omitted some term to which the parties had agreed prior to the execution of the written document—on the theory that "the writing does not evidence the real contract"[699]:

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[697] *See* Bank of Shaw v. Posey, 573 So. 2d 1355, 1359 n.3 (Miss. 1990); Franklin v. Lovitt Equip. Co., 420 So. 2d 1370, 1372 (Miss. 1982); Patten-Worsham Drug Co. v. Planters' Mercantile Co., 38 So. 209, 210 (Miss. 1905); *see also* Phillips v. Chevron U.S.A., Inc., 792 F.2d 521, 525-26 (5th Cir. 1986) (applying Mississippi law). *See generally Byrd*, 171 So. 2d at 867; Stirling v. Logue, 123 So. 825, 827 (Miss. 1929) (both reciting that, absent fraud, mistake, accident, or other factor sufficient to invalidate contract, parol evidence is not admissible to add to, subtract from, vary or contradict unambiguous, integrated contract). *But see* McCall Co. v. Parsons-May-Oberschmidt Co., 66 So. 274, 275-76 (Miss. 1914) (finding error in trial court's admission of parol evidence, notwithstanding offering party's argument that evidence was to show that other party fraudulently induced offering party to enter into written contract, on ground that "[t]he same argument can always be made when it is sought to vary a contract by parol on the ground that the parties thereto placed a construction upon it at variance with its plain meaning"). "Fraud vitiates all things, and may be predicated of promises designed to entrap the unwary, and never intended to be kept, as well as of misstatements of existing facts." *Patten-Worsham Drug*, 38 So. at 210.

[698] Brown v. Ohman, 42 So. 2d 209, 213 (Miss. 1949). The *Brown* court stated

> there is an exception to the parol evidence rule in actions of fraud and deceit even though the contract itself recites that each contracting party relies and acts upon his own knowledge and not upon the representations of his adversary, this being for the reason that misrepresentations may induce a party to enter into a contract which contains such a provision.

Brown, 42 So. 2d at 213. *But see* J.B. Colt Co. v. Harris, 171 So. 695, 697 (Miss. 1937) ("[T]he written contract . . . was based upon the terms of the contract in which appellees plainly stated to the appellant that they were not relying upon any statement or representation which was not contained therein; and the evidence as to the representations . . . was incompetent and should have been excluded by the court.").

> The fact that a contract is in writing does not preclude the introduction of evidence to show that a material stipulation therein was founded on the misrepresentations and fraud of one of the parties, or inserted by fraud, or that a material stipulation was omitted on account of fraud.
>
> . . . . [W]hen fraud enters into a transaction to the extent of inducing a written contract, the instrument never becomes a valid contract and hence . . . the parol evidence rule is not applicable . . . . [F]raud cannot be merged; hence, the doctrine that prior negotiations and conveyances leading up to the formation of a written contract are merged therein is not applicable to preclude the admission of parol or extrinsic evidence to prove that a written contract was induced by fraud. The reduction of an agreement to writing is not at all conclusive against fraud in the contract, and the admission of extrinsic evidence which bears clearly upon the existence of fraud sought to be established for the purpose of avoiding the effect of the written agreement—as by rescission, reformation, or the establishment of a trust—or as the basis of a tort action, does not constitute an attempt to vary the terms of the agreement by parol. It was never intended that the parol evidence rule be used as a shield to prevent the proof of fraud, or that a person could arrange to have an agreement obtained by him through fraud exercised upon the other contracting party reduced to writing and formally executed, and thereby deprive the courts of the power to prevent him from reaping the benefits of his chicanery . . . . The general rule that parol or extrinsic evidence is admissible to prove that a written contract was procured by fraud applies . . . whether the evidence offered relates to fraud in the omission of a material provision or to fraud in the insertion of, or a misrepresentation concerning, a certain term in the instrument, or whether the evidence offered directly contradicts the writing or merely covers a point not referred to in the writing, and in spite of special provisions in the contract which purport to

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[699] Sistrunk v. Wilson, 54 So. 89, 89 (Miss. 1911).

> limit the application of parol evidence by stating that the writing contains all the terms involved and the representations made, or that the written contract shall be the sole evidence of the transaction, or that each contracting party relies and acts only upon his own knowledge, and not upon the representations of his adversary.[700]

Indeed,

> [i]t is practically a universal rule that in suits to reform written instruments on the ground of fraud . . . , parol evidence is admissible to establish the fact of fraud . . . and in what it consisted, and to show how the writing should be corrected in order to conform to the agreement or intention which the parties actually made or had . . . . If this were not so, a rule adopted by the courts as a protection against fraud and false swearing would, as has been said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent. Evidence of fraud . . . is seldom found in the instrument itself, and unless parol evidence may be admitted for the purpose of procuring its reformation, the aggrieved party would have as little hope of redress . . . [701]

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[700] *Brown*, 42 So. 2d at 212-13; *see also* McArthur v. Fillingame, 186 So. 828, 829 (Miss. 1939) ("Parol evidence may be admitted to avoid a contract in toto, as for fraud and the like, at the time of the execution thereof, but not to vary its terms so that it may stand in part as written, and go down as to other parts."); Howie Bros. v. Walter Pratt & Co., 35 So. 216, 217 (Miss. 1903) ("'[P]arol evidence may be admitted to show that the instrument is altogether void, or that it never had any legal existence or binding force, . . . by reason of fraud . . . . This qualification of the rule applies to all contracts.' . . . . It is one thing to attempt to vary, alter, or contradict the terms of a written contract once validly executed, and quite a different thing to show that the contract offered never had any legal existence, because its execution was procured by fraud." (quoting Wren v. Hoffman, 41 Miss. 616, 620 (1868)); Grayson v. Brooks, 1 So. 482, 483 (Miss. 1887) ("Where the parties have reduced their agreements to writing, it is not admissible to show another contract than that evidenced by the writing. But where, by the fraud of one or both of the parties, the true contract is not shown by the writing, and is not intended to be so shown, the principle invoked has no application."). *See generally* Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 547 (Miss. 1969) (reciting that parol evidence may be used to show written contract's validity is impaired by, *inter alia*, fraud).

[701] Smalley v. Rogers, 100 So. 2d 118, 119-20 (Miss. 1958), *quoted with ap-*

In *State Highway Commission v. Powell,*[702] an agent of the Commission was dispatched to negotiate a right-of-way across the plaintiffs' land.[703] On assurances from the agent that the Commission would provide an underpass through which the plaintiffs' livestock could go to and from the pasture and the water supply, and by means of which the plaintiffs could have access to and from the field, the plaintiffs agreed.[704] The Commission, in fact, only provided drainage under the new highway, and the plaintiffs sued to rescind the contract.[705] Despite the fact that the written agreement between the plaintiffs and the Commission said nothing about the Commission building an underpass sufficient to permit the plaintiffs and their livestock to pass under the road, the plaintiffs prevailed both at trial and before the supreme court on the strength of their testimony regarding the agent's oral misrepresentations[706]:

> The chancellor found from the testimony that this assurance given them by the agent amounted to a representation of an existing fact, and not merely a promise to do something in the future; that except for the representation that the State Highway Commission had already planned to provide such an underpass the deed of conveyance here involved would not have been executed for the consideration of $325 paid therefor; and that since the Highway Commission had not planned to provide the underpass, but had planned to install and did in fact install, only a 3 x 3 foot culvert in the hollow underneath the proposed highway, the appellees were entitled to a cancellation of the deed upon the return of the consideration paid on the ground that there had been a false and fraudulent representation as to an alleged existing fact in regard to what the Commission had planned to do in that behalf . . . .

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proval in Bedford v. Kravis, 622 So. 2d 291, 294 (Miss. 1993).

[702] 185 So. 589 (Miss. 1939).

[703] *Powell,* 185 So. at 589.

[704] *See id.*

[705] *Id.*

[706] *Id.* at 591.

> The agent who procured the execution of the conveyance denied having made the representation, but several witnesses having testified to the contrary, and the chancellor having found in favor of appellees on such conflict in the testimony, we must assume that the deed was procured under the circumstances hereinbefore mentioned. The parol evidence was admissible, since it did not vary, alter or contradict a valid written instrument, but showed that there was no valid contract at all by reason of the fraud alleged to have been perpetrated.[707]

A party seeking to prove either variety of fraud (i.e. fraudulent inducement or "fraud of the draftsman") must do so by clear and convincing evidence.[708]

2. *Negligent Misrepresentation*

By the same rationale, parol evidence should also be admissible to show that the offering party was induced to enter into the contract by some material misrepresentation, even if that misrepresentation did not rise to the level of fraud.[709]

3. *Duress or Undue Influence*

Parol evidence may be admitted to establish that a facially integrated and unambiguous written agreement was formed as a result of duress or undue influence.[710]

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[707] *Id.* at 589-90; *see also* Fornea v. Goodyear Yellow Pine Co., 178 So. 914, 918 (Miss. 1938) ("[I]f the writing is procured by false representations, or fraud, committed by one of the parties to the writing on the other, on which he might reasonably rely, the court will permit the facts to be shown, and if fraud was committed in the procurement of the contract, it will be avoided; in other words, no contract exists in legal contemplation which is procured by fraud.").

[708] *See, e.g.*, Franklin v. Lovitt Equip. Co., 420 So. 2d 1370, 1373 (Miss. 1982); Bethea v. Mullins, 85 So. 2d 452, 456 (Miss. 1956); Pearce v. Pierce, 58 So. 2d 824, 825 (Miss. 1952); Grenada Auto Co. v. Waldrop, 195 So. 491, 492-93 (Miss. 1940). *See generally* Foster v. Wright, 127 So. 2d 873, 875 (Miss. 1961) ("It is a well-settled doctrine that in all cases the presumption of evidence is in favor of honesty.").

[709] *See* Nichols v. Shelter Life Ins. Co., 923 F.2d 1158, 1163 (5th Cir. 1991) (applying Mississippi law); *see, e.g.*, Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1181-82 (Miss. 1990); Scott v. Transport Indem. Co., 513 So. 2d 889, 895-96 (Miss. 1987).

4. *Mutual Mistake*

The parol evidence rule does not bar extrinsic proof of mistake.[711] As with fraud,[712]

> "It is practically a universal rule that in suits to reform written instruments on the ground of . . . mistake, parol evidence is admissible to establish the fact of . . . a mistake and in what it consisted, and to show how the writing should be corrected in order to conform to the agreement or intention which the parties actually made or had . . . . Evidence of . . . mistake is seldom found in the instrument itself, and unless parol evidence may be admitted for the purpose of procuring its reformation, the aggrieved party would have as little hope

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[710] *See* Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 547 (Miss. 1969) (discussing duress); *see also* Sheehan v. Kearney, 21 So. 41, 42 (Miss. 1896) (holding that, in absence of undue influence or other issue of "testamentary capacity being involved, . . . parol evidence is not competent to vary, enlarge, or contradict the will"). *See generally* Hitz v. Jenks, 123 U.S. 297, 305-06 (1887) (holding that, absent fraud or duress, extrinsic evidence was incompetent to impeach written, signed agreement); F.R. Hoar & Sons, Inc. v. McElroy Plumbing & Heating Co., 680 F.2d 1115, 1117 (5th Cir. 1982) ("[I]t may be shown by parol evidence . . . that the proffered instrument was not the complete contract, or that its validity was impaired by . . . duress . . . .") (applying Mississippi law).

[711] *See* Bedford v. Kravis, 622 So. 2d 291, 295-96 (Miss. 1993); Holliman v. Charles L. Cherry & Assocs., Inc., 569 So. 2d 1139, 1145-46 (Miss. 1990); Penfield v. Cook, 355 So. 2d 1104, 1105 (Miss. 1978); Brimm v. McGee, 80 So. 379, 380-81 (Miss. 1919); *see also, e.g., F.R. Hoar & Sons*, 680 F.2d at 1115-17 (finding that parol evidence rule did not bar evidence of mistake). *See generally Broome Construction*, 229 So. 2d at 547 (reciting that parol evidence may be used to show that written contract's validity is impaired by, *inter alia*, mistake).

Mutual mistake occurs when both (or all) parties to an agreement have contracted under a misconception about or ignorance of a material fact. *See* Greer v. Higgins, 338 So. 2d 1233, 1236 (Miss. 1976). "The mistake may apply to the nature of the contract, the identity of the person with whom it is made, or the identity or existence of the subject matter; but in order to relieve a party from liability on the contract, the mistake must relate to a material fact, past or present." *Id.* To qualify as an exception to the parol evidence rule, the mistake must be *mutual*. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 152, 155 (1981). *But see F.R. Hoar & Sons*, 680 F.2d at 1115-17 (finding that the parol evidence rule did not bar evidence of unilateral mistake).

[712] *See supra* subpart III.B.1.

> of redress . . . .
>
> "Generally, it may be said that any testimony which tends to prove the mistake alleged or the intention of the parties is admissible. A witness in a position to know may testify concerning the intention of the parties to an agreement, to the same effect as to any other fact."[713]

That said, parol testimony to reform a writing on the basis of mistake "must be received with 'great caution and distrust.'"[714] Mistake must be proven beyond a reasonable doubt.[715] The Mississippi Supreme Court has stated that "it is better that a doubtful written instrument should stand[] than that a doubtful provision should be substituted by parol testimony."[716]

5. *Illegal Provisions or Agreements*

Parol evidence is admissible to show that part or all of an otherwise integrated, unambiguous contract is, or was entered into in a manner that is, contrary to law, public policy, or public morals.[717]

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[713] Smalley v. Rogers, 100 So. 2d 118, 119-20 (Miss. 1958) (quoting 45 AM. JUR. *Reformation of Instruments* § 113), *quoted with approval in Bedford*, 622 So. 2d at 294.

[714] Watson v. Owen, 107 So. 865, 866 (Miss. 1926); *accord* Frierson v. Sheppard, 29 So. 2d 726, 727 (Miss. 1947).

[715] *See* Penfield v. Cook, 355 So. 2d 1104, 1106 (Miss. 1978); Sunnybrook Children's Home, Inc. v. Dahlem, 265 So. 2d 921, 925 (Miss. 1972); Brown v. King, 58 So. 2d 922 (Miss. 1952); *Frierson*, 29 So. 2d at 727.

[716] Harrington v. Harrington, 3 Miss. (2 Howard) 701, 718 (1838), *quoted with approval in Frierson*, 29 So. 2d at 727, *and* Progressive Bank of Summit v. McGehee, 107 So. 876, 877 (Miss. 1926); *see also* Jones v. Jones, 41 So. 373, 373 (Miss. 1906) (stating that evidence to warrant reformation of written instrument must sustain allegation of mutual mistake "practically to the exclusion of every other reasonable hypothesis"); St. Paul Fire & Marine Ins. Co. v. McQuaid, 75 So. 255, 257 (Miss. 1917) (same). *See generally* Lauderdale v. Hallock, 15 Miss. (7 S. & M.) 622, 629 (1846) (stating that parol evidence to explain or vary terms of writing must be received with "great caution and distrust").

[717] Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 547 (Miss. 1969); *see, e.g.*, Wilson Indus., Inc. v. Newton County Bank, 245 So. 2d 27, 31 (Miss. 1971) ("In cases involving usury, parol evidence is admissible to show that writings are not what they seem and to establish the true facts with respect to the transaction. In such cases it may be shown by parol that a docu-

In *Merchants Bank & Trust Co. v. Walker*,[718] Walker gave the Bank a note in the amount of $450. Walker argued that the note, given for a balance due on a former note given by him to the Bank in payment for five shares of the Bank's corporate stock, was unenforceable as against statute.[719] The Bank, on the other hand, argued that Walker gave the Bank the (second) note in exchange for a loan by the Bank to enable Walker to purchase five shares of the Bank's capital stock.[720] Apparently, the note itself did not describe the obligation for which it was given. Therefore, the trial court permitted Walker to present evidence of the note's illegal purpose, and Walker ultimately prevailed at trial. On appeal, the Mississippi Supreme Court considered whether the trial court had properly allowed the evidence:

> Whether the note . . . was given to the appellant in payment for shares of its corporate stock was submitted to the jury which found on ample evidence therefor that it was so given . . . .
>
> . . . .
>
> There was no error in admitting the appellee's evidence which contradicted the statement in his letter to the appellant that he was making a loan with the appellant in order to complete the purchase of the five shares of stock. This letter is not a contract but at most constitutes a mere admission of a fact and even if it were a contract the evidence does not simply contradict it but if true discloses that it was made in furtherance of an object forbidden by law.[721]

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ment, legal in form, was in fact a device to disguise usurious interest or does not reflect the real agreement, and that sums mentioned are in truth, usurious interest."); *see also* Yeager v. Ainsworth, 32 So. 2d 548, 550 (Miss. 1947); Grayson v. Brooks, 1 So. 482, 483 (Miss. 1887) (both holding, likewise, that parol evidence is admissible to show usury).

[718] 6 So. 2d 107 (Miss. 1942).

[719] *Walker*, 6 So. 2d at 107. The applicable statute provided that "a note, obligation, or security of any kind given or transferred by any subscriber for stock in any corporation shall not be considered, taken, or held as payment of any part of the capital stock of the company." MISS. CODE ANN. § 4148 (1930).

[720] *Walker*, 6 So. 2d at 107.

[721] *Id.* at 108-09.

In *Mitchell v. Campbell,*[722] the court held that parol evidence was admissible to prove that a lease was entered into with the intent to carry on an illegal business—namely, a brothel and bar:

> [I]f a landlord knowingly leases his property to be used for the purposes of prostitution, he cannot recover for rents which a tenant has agreed to pay. The whole contract is against public policy, an offense against morality, and absolutely void . . . .
>
> . . . . If the contract is in writing, parol evidence is admissible to expose its immoral and unlawful character.[723]

6. *Non-Existent, or "Sham," Contracts*

Parol evidence is admissible to show that a valid contract never, in fact, existed between the purported contracting parties, or that, despite the existence of a written instrument purporting on its face to be a contract, the parties never intended to perform it, or that the purported contract is a "sham" agreement.[724]

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[722] 72 So. 231 (Miss. 1916).

[723] *Mitchell,* 72 So. at 232-33 (citations omitted); *accord* Lavecchia v. Tillman, 76 So. 266, 266 (Miss. 1917). The *Mitchell* court stated that

> courts will not lend their aid in enforcing illegal contracts. The door of the court is and must always be open to litigants having substantial rights to be enforced or wrongs to be redressed, and in searching for truth and justice much perjury, filth, and crime are often necessarily exposed. The law, however, is always on the side of morality. Courts are founded to execute the laws, and not to sanction or assist in their violation. As well said by Johnson, J., in *Bank v. Owens,* "No court of justice can in its nature be made the handmaid of iniquity."

Mitchell, 72 So. at 233 (citation omitted) (quoting Bank of U.S. v. Owens, 27 U.S. (2 Pet.) 527, 538 (1829)).

[724] *See, e.g.,* Clow Corp. v. J.D. Mullican, Inc., 356 So. 2d 579, 583 (Miss. 1978) (holding that parol evidence was properly admitted to address whether an individual who purported to execute an otherwise unambiguous written contract on behalf of corporate defendant had actual or apparent authority to do so); Lewis v. Lewis, 129 So. 2d 353, 358 (Miss. 1961) ("When the validity of an instrument of this kind is questioned, . . . evidence which tends to prove or disprove [its] existence . . . should be admitted; and many courts have held that the declarations of the testator that he had made a will and that he kept it in a certain place are admissible, at least to corroborate evidence of the existence or

7. *Evidence Pertinent to Consideration*

a. *Lack of or Failure of Consideration*

Parol evidence is admissible to show want or failure of consideration[725]:

> The rule of exclusion does not apply to evidence of failure of consideration . . . . [I]t is allowable to show by parol that the writing never had validity, or, that having had a legal existence, it has for some reason ceased to be operative.[726]

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nonexistence of the will in question."); Owen v. Sumrall, 36 So. 2d 800, 803 (Miss. 1948) ("We think that evidence was relevant on this trial and will be relevant on another trial, if one is had, grounded upon the existence or non-existence of an agreement of Owen to pay drafts drawn by Davis upon him in favor of Sumrall in payment of the price of cattle purchased by Davis from Sumrall until Owen should notify Sumrall to the contrary."). *See generally* Martin v. Smith, 3 So. 33, 34 (Miss. 1887) ("It is true that, generally, extrinsic testimony is not admissible to vary or explain negotiable instruments, but one exception to the rule is that where anything appears on the face of the paper to suggest a doubt as to the party bound, or the character in which any of the signers acted in affixing his name, parol testimony may be admitted, as between the original parties, to show the true intent and meaning of the parties."). *But see* Martin v. First Nat'l Bank of Hattiesburg, 164 So. 896, 898 (Miss. 1936) ("Under well-settled principles, the parol evidence to the effect that while the appellants executed a contract of assignment in writing in favor of Watkins, the terms of which were clear, binding, and unambiguous on its face, yet it was understood that they were not to be performed as therein stated, or indeed at all, was clearly incompetent.").

[725] *See, e.g., In re* Will of Johnson, 351 So. 2d 1339, 1341 (Miss. 1977); Merchants' & Farmers' Bank v. Smith, 64 So. 970, 971 (Miss. 1914); Cocke v. Blackbourn, 57 Miss. 689, 691 (1880); *see also* Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 547 (Miss. 1969) (reciting that parol evidence may be used to show that written contract's validity is impaired by, *inter alia*, lack of or failure of consideration). *See generally* C & D Inv. Co. v. Gulf Transp. Co., 526 So. 2d 526, 530 (Miss. 1988) ("The general rule is that consideration for a contract need not appear on the face of the instrument, but may be proved by extrinsic evidence.").

[726] Meyer v. Casey, 57 Miss. 615, 617 (1880). Furthermore,

> [w]here a written agreement requires consideration and none is stated in the writing, a finding that the writing is a completely integrated agreement would mean that it is not binding for want of consideration. Since only a binding integrated agreement brings the parol evidence rule into operation, evidence is admissible to show that there was consideration and what it was.

RESTATEMENT (SECOND) OF CONTRACTS § 218 cmt. d, at 145 (1981); *see also id.*

In *In re Will of Johnson*,[727] the appellant (wife) testified that the only "consideration" she received for agreeing not to renounce her husband's will was the provision in her husband's will that she was to have a life estate in the homestead property,[728] which, she claimed, was no consideration, as she was entitled to a life estate in the homestead as a matter of law.[729] The court stated that

> [t]he appellee m[et] this by contending that since the contract recited that there were other considerations besides the life estate devised to the widow that the appellant could not show by parol evidence that there was in fact no other consideration and that the appellant is bound by the recitation in the contract. However, that rule of exclusion does not apply to evidence of failure of consideration. In the case of *Meyer v. Casey*,[730] this Court addressed itself to that point:
>
> > The consideration [for] the bill of sale of the cotton wholly failed as to Casey. The written instrument recites a consideration, and it is claimed that it is not allowable to contradict the writing in this respect. The rule of exclusion does not apply to evidence of failure of consideration. It is not admissible to vary by parol the terms of a valid written instrument. If it has a valid existence, it must stand as the sole expositor of the terms of the contract it evidences; but it is allowable to show by parol that the writing never had validity, or, that having had a legal existence, it has for some reason ceased to be operative.
>
> We therefore hold that the chancellor properly admitted parol evidence to show that there was in fact no consideration other than the devise to the widow of a life estate in the

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§ 218(2) ("[Extrinsic e]vidence is admissible to prove whether or not there is consideration for a promise, even though the parties have reduced their agreement to a writing which appears to be a completely integrated agreement.").

[727] 351 So. 2d 1339 (Miss. 1977).

[728] *Will of Johnson*, 351 So. 2d at 1340-41.

[729] *See id.* at 1341 (citing MISS. CODE ANN. § 91-1-23 (1972)).

[730] 57 Miss. 615 (1880).

homestead.[731]

b. True Consideration

Parol evidence may also establish the real consideration given for a written agreement where that real consideration is different from what is recited in the agreement,[732] where the

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[731] *Will of Johnson*, 351 So. 2d at 1341 (quoting *Meyer*, 57 Miss. at 617).

[732] The Mississippi Supreme Court has explained that

> [t]he terms of an obligation, assumed to be valid, cannot be varied by parol; but it may be shown by parol what caused the party to thus oblige himself. That consists with the written obligation, and does not vary it. The right to show the real consideration is a qualification of the general rule of the admissibility of parol evidence to alter the terms of a written contract, and is as well established as the rule itself. What I bind myself by writing to do cannot be varied by parol; but I may always show by parol what induced me to thus bind myself . . . .

Cocke v. Blackbourn, 57 Miss. 689, 691-92 (1880) (citation omitted); *see, e.g.*, Raleigh State Bank v. Williams, 117 So. 365, 367 (Miss. 1928) (holding that seller was entitled to present extrinsic evidence that true consideration for sale of property was $5,850, even though written conveyance of the lands recited a consideration of only $3,500 "cash in hand," because "the true consideration for the conveyance may be shown by parol. The principle that parol evidence is not admissible to vary the terms of a written contract has no application to the consideration recited in a contract."); Campbell v. Davis, 47 So. 546, 546 (Miss. 1908) (holding that parol evidence that the $700 due stated in writing was actually only $200 was admissible). *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 218 cmt. e, at 145 ("Where consideration is required, the requirement is not satisfied by a false recital of consideration . . . . An incorrect statement of a consideration does not prevent proof either that there was no consideration or that there was a consideration different from that stated."). *But see* Noble v. Logan-Dees Chevrolet-Buick, Inc., 293 So. 2d 14, 15 (Miss. 1974) (holding that trial court improperly considered testimony that insurance check, not mentioned in parties' written contract, was part of the consideration for deal because "the evidence offered would show a different consideration from that expressed in the writing."); Thompson v. Bryant, 21 So. 655, 656 (Miss. 1897) ("[A] consideration recited or admitted merely as a fact may be varied by parol, while the terms of a contract may not be, and that, where a stipulation as to the consideration becomes contractual, it, like any other written contract, is the exclusive evidence, and cannot be varied by parol."); Baum v. Lynn, 18 So. 428, 430 (Miss. 1895) (same). As one court wrote,

> ordinarily parol evidence is admissible to explain, or even contradict, a written contract as to the *mere consideration*; but, when the consideration is *contractual*, parol evidence is no more admissible to vary that than it is any other part of the written instrument . . . . [A] consideration, recited in a written contract merely as a fact, may be varied by parol evidence; but, when the stipulation of the writing concerning the

agreement fails to recite the consideration at all,[733] or where

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> consideration is *contractual,* it cannot be so varied. The terms of the contract are the propositions stated and accepted by the parties, and when these are reduced to writing the writing settles the contract and binds the parties, and it is not competent afterwards for one of them to show by parol evidence that the written contract does not express the real agreement. So to do would be in the very teeth of the rule prohibiting the variance or contradiction of a written contract by parol. The very object of the parties in reducing the contract to writing is that it shall no longer be subject to oral disputation.

Dodge v. Cutrer, 58 So. 208 (Miss. 1912) (emphasis added).

The court in *Thompson v. Bryant,* found that extrinsic evidence of consideration was incompetent to prove the "real consideration" for the agreement between the parties:

> The terms of the contract are embodied in the note and bill of sale, and the contract they disclose shows what each of the parties finally agreed and contracted to do, and what they did, in relation to the transaction. Thompson sold and warranted his half interest in stock of goods, merchandise, etc., in the business of Buford & Thompson, to J. O. Bryant, and Bryant paid him $1,200 in cash, and gave him his note for $500, payable in 90 days. It is clear that the consideration is contractual, and is not a mere fact recited or admitted in the written contract. It cannot be said that the proffered testimony would not contradict, alter, add to, or vary the terms of the contract, but only a mere fact recited or admitted in the contract. To permit appellant to show that Bryant assumed his part of the debts of Buford & Thompson at the time he executed his note to appellant would most certainly import a new element into the contract. The testimony was properly excluded.

Thompson, 21 So. at 656.

[733] *See* Sunflower Bank v. Pitts, 66 So. 810, 812 (Miss. 1914) ("The parol evidence introduced does not vary the express terms of the contract, for the simple reason that the contract does not recite any consideration. If no consideration is expressed in a written contract, the real consideration may be shown."); *see, e.g.,* Boatright v. Horton, 86 So. 2d 864, 867-68 (Miss. 1956).

In *Walley v. Bay Petroleum Corp.,* 312 F.2d 540 (5th Cir. 1963),

> the defendants sought to introduce evidence tending to show that appellant's guaranty was made in reliance upon appellee's promise to sell refined petroleum products to Walco on terms competitive with the independent field. Appellant (and his son) contended that the appellee failed so to price its products, and that such failure, which constituted a breach of appellee's promise, was the cause of the Walleys' breach, if any. The trial judge excluded that evidence on the basis of the parol evidence rule.

Walley, 312 F.2d. at 543 (applying Mississippi law). The Fifth Circuit held that the trial court had erroneously excluded the evidence, and remanded the case for a new trial:

the agreement describes some form of consideration and adds "and other valuable consideration," or words to that effect.[734]

The Mississippi Supreme Court stated nearly 120 years ago:

> We consider it well settled that the real consideration of a [contract] may be shown by parol, what ever may be the statement of the [contract] as to the consideration. If this were not so, all inquiry could be shut out by the easy process of stating the consideration in every [contract] to be gold coin or other equally unassailable consideration, and then the defence of illegality, or want or failure of consideration would be unknown, to the great relief of courts, but at the expense

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> In essence, the evidence offered, and rejected, went to show that, in addition to the recitation of consideration received, contained in the notes, there was promissory consideration to the appellant, namely, appellee's promise to sell the products to Walco on competitive terms. The only written consideration for appellant's promise of guaranty is the recital in the notes, "for value received." Of course, that recitation, being only the recital of a fact, could be contradicted in parol because, not being promissory, the recital is not part of the agreement . . . .On a new trial, therefore, any evidence offered by appellant to show the existence of a collateral promise by appellee to sell its products to Walco on a competitive basis, is to be admitted . . . . Of course, it will be for the jury to determine whether the appellee did, in fact, make the promises as alleged by appellant.

Id. at 544-45 (footnotes omitted).

[734] *See, e.g.*, Management, Inc. v. Crosby, 197 So. 2d 247, 251 (Miss. 1967) ("consideration of ten dollars, and other good and valuable consideration"); Morehead v. Morehead, 75 So. 2d 453, 456 (Miss. 1954) ("$500, and other valuable considerations"); Haden v. Sims, 150 So. 210, 210 (Miss. 1933) ("$1 and other considerations"); Blum v. Planters' Bank & Trust Co., 135 So. 353, 355 (Miss. 1931) ("$10 and other consideration, good and valuable"). The mere presence of a phrase to the effect of "other valuable considerations" will not necessarily open the door to extrinsic evidence if it is followed by some qualifier that would, standing alone, constitute "other valuable consideration." *See, e.g.*, Rogers v. Rogers, 43 So. 434, 434-35 (Miss. 1907) (prohibiting extrinsic evidence where conveyance described consideration as "$1 and other valuable consideration, that J.T. Rogers shall look after my welfare and business when so required to do"); State Hwy. Dep't v. Duckworth, 172 So. 148, 149-50 (Miss. 1937) (holding that extrinsic evidence was not invited by including "and other valuable consideration" in the deed when deed proceeded to recite that "[t]he consideration herein stated includes all damage to fences, property and the like, and the rebuilding of fences caused by the construction of said highway").

of justice between the parties litigant.[735]

8. Scrivener's Error

Extrinsic evidence may be admissible to show the existence of a clerical error or omission in a written instrument.[736]

In *Traders' Insurance Co. v. E.D. Edwards Post No. 22, G.A.R.*,[737]

> [t]he time for which appellant undertook to insure the society hall of appellee and its furniture and paraphernalia is fixed in the policy as being "for the term of three years from the fourteenth day of January, 1903, at noon, to the fourteenth day of January, 1904, at noon."[738]

The court found that the trial court had erred in failing to admit oral testimony to clear up the internal conflict on the face of the policy:

> This attempted statement of the time for the duration of the contract involves two descriptions, each of which is perfectly clear in itself, but which are mutually inconsistent and contradictory. It is a palpable case of equivocation in description, induced, doubtless, by clerical misprision. The court erred in not permitting the introduction of parol evidence to show which of the two periods named in the policy was the one in contemplation of the parties. Parol evidence is admissible in such a case, not to vary the contract, nor to make a contract for the parties, but to make clear what the contract really was.[739]

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[735] Cocke v. Blackburn, 57 Miss. 689, 691 (1880).

[736] *See* Robinson v. Martel Enters., Inc., 337 So. 2d 698, 701 (Miss. 1976) ("A written contract should be construed according to the obvious intention of the parties, notwithstanding clerical errors or inadvertent omissions therein, which can be corrected by perusing the whole instrument. If an improper word has been used or a word omitted, the court will strike out the improper word or supply the omitted word if from the context it can ascertain what word should have been used."); *see, e.g.*, Webb v. Mobile & Ohio R.R., 62 So. 168, 168 (Miss. 1913) (holding parol evidence admissible to correct date from "1906" to "1907").

[737] 38 So. 779 (Miss. 1905).

[738] *Traders' Ins.*, 38 So. at 779.

[739] *Id.; see also, e.g.*, Barnett v. Getty Oil Co., 266 So. 2d 581, 586 (Miss. 1972) (holding that parol evidence was admissible to show that "through a

If the intention of the parties is obvious from the contract, despite the scrivener's error, a court "may strike an improper word or clerical error or include an inadvertent omission so long as the court understands what words should have been used."[740]

In *Newell v. Hinton*,[741] the court was faced with a property settlement agreement entered into between the parties addressing the disposition of and responsibility for payments on a "1984 Ford Mustang," despite the fact that Hinton and Newell traded their 1984 Ford Mustang for a 1985 Ford Mustang on June 28, 1985—roughly six weeks *before* they signed the property settlement agreement.[742] The *Newell* court explained:

> On the other hand, however, when the judgment was executed, there remained some forty-four monthly payments for the 1985 Mustang. Indeed if the parties were contracting the obligations concerning the 1984 Mustang, then they would have failed completely to address the payments of the new car. If they had failed to address this concern, then the obvious question would be: who would be responsible for paying the notes on the 1985 Mustang? Consequently, it is obvious the parties were not referring to the 1984 Mustang when they drafted and executed the property settlement agreement.
>
> . . . .
>
> . . . Newell concedes that the parties did trade in their 1984 Mustang for a 1985 Mustang . . . .
>
> Newell maintains, however, that she and Hinton reached an agreement as to the division of property and delegation of debts, that they spoke with their attorney and provided him with lists for his use in drawing up the property settlement agreement, and that they did this prior to the time they traded the 1984 Mustang. Newell further claims that she never agreed to be solely responsible for the lease on the new car

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scrivener's error the subject land was specifically described as the south one-fourth of northwest one-fourth (S 1/4 of NW 1/4) of said Section 17 instead of the south one-half of the northwest one-fourth (S 1/2 of NW 1/4) of said Section 17").

[740] Newell v. Hinton, 556 So. 2d 1037, 1042 (Miss. 1990).

[741] 556 So. 2d 1037 (Miss. 1990).

[742] *Newell*, 556 So. 2d at 1042.

> and that Hinton agreed to help her with the lease. Because Hinton did not assist her, Newell had to let the car go back to Ford because she could not handle the payments alone. Newell's defense can be summed up in one sentence: "I only agreed to be responsible for the payments on the 1984 Mustang, not the 1985 Mustang." With this in mind the focus once again is turned to the 1985 Mustang.
>
> .... The property settlement agreement has become a part of the final divorce decree for all legal intents and purposes. When ambiguities, such as the one involved in this case, are discovered the agreement should be construed "much as is done in the case of a contract, with the court seeking to gather the intent of the parties and render its clauses [words or numbers] harmonious in light of that intent." It could not have been the intent of the parties to enter a contract involving a car they no longer owned.[743]

9. Lost or Destroyed Contract

If a written and signed contract is lost or destroyed, such that the party seeking to prove or enforce the agreement is unable to produce the written agreement in court, the party must prove its execution, terms, and loss or destruction, and may do so by parol evidence.[744]

In *Bolden v. Gatewood*,[745] Gatewood and Bolden were equal partners in the Marshall County Equipment Company. Prior to Gatewood's death, Gatewood and Bolden each took out $25,000 life insurance policies on the other. The partners were also to have executed a contingent "buy-sell" agreement that, in the event one of them died, would enable the surviving partner to buy-out the deceased partner's share of the partnership using the proceeds of the life insurance policy "plus any additional sum required."[746] After Gatewood died,

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[743] *Id.* at 1042-43 (citations omitted).

[744] *See, e.g.*, Bolden v. Gatewood, 164 So. 2d 721, 730-31 (Miss. 1964); Dewees v. Bostick Lumber & Mfg. Co., 50 So. 865, 866 (Miss. 1910); *see also* Howie Bros. v. Walter Pratt & Co., 35 So. 216, 217 (Miss. 1903) (holding that trial court erred by refusing to allow testimony regarding contents of letters from one of parties where party offering testimony had shown letters to have been lost or destroyed). *But cf.* Gulfport Sash, Door & Blind Mfg. Co. v. Town of Bond, 49 So. 260, 261 (Miss. 1909) (holding parol evidence of contents of writing not competent if party proffering parol evidence failed to account for absence of writing).

[745] 164 So. 2d 721 (Miss. 1964).

> the policies were found, but the 'buy-sell' agreement was not found. Bolden collected the $25,000 on the policy issued on the life of Gatewood, but denied the execution of the 'buy-sell' partnership agreement and refused to pay over to the legal representative of Gatewood's estate the proceeds of the policy as the purchase price of Gatewood's interest in the estate of the partnership.[747]

Gatewood's executrix sued Bolden for the proceeds of the policy, arguing that the "buy-sell" agreement that obligated Bolden to use the insurance proceeds to buy-out Gatewood's partnership interest "had either been lost or destroyed, or was being withheld from [Gatewood's executrix and heirs], but that the defendant Edgar Lee Bolden had admitted the execution of such agreement."[748] The chancellor, having heard and considered considerable oral testimony regarding the alleged "buy-sell" agreement, held:

> It is not humanly possible for the court to know whether or not the agreement was executed, and if so, what became of it. However, by a preponderance of the evidence, I am forced to reach the conclusion that the complainant has met the burden of proof, that it was executed in the form copy of which is in evidence, and that it was lost or destroyed; and that under the law, and in good conscience and under the principles of equity, it should be enforced.[749]

The Mississippi Supreme Court affirmed, finding "ample evidence in the record to support the finding of the chancellor that the complainant had met the burden of proof, that the 'buy-sell' agreement . . . was executed and lost or destroyed."[750] In support of its holding, the court specifically referred to the oral testimony of the insurance agent who sold Gatewood and Bolden their policies and provided them with the draft "buy-sell" agreement, as well as oral testimony by Gatewood's executrix and her brother regarding statements made to them by Bolden shortly after Gatewood's death.[751]

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[746] *Bolden*, 164 So. 2d at 722-23.

[747] *Id.* at 722.

[748] *Id.* at 723-24.

[749] *Id.* at 730.

[750] *Id.*

This exception to the parol evidence rule is not intended to vitiate the "best evidence" rule.[752] Rather, the exception applies only where the "best evidence" is not available.[753]

10. Material Alteration

If one party alleges that a written and signed contract offered into evidence lacks or alters some material provision that was present when the party signed the contract, or includes a material provision that was not present when the party signed the contract, the terms of the written contract at the time its was actually agreed to by the parties may be proved by parol evidence.[754] An alteration is "material" if it "enlarges the scope of an instrument as a means of evidence."[755]

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[751] *Id.* at 731.

[752] *See* Casey v. Valentour, 218 So. 2d 863, 865 (Miss. 1969) ("Ordinarily, the contents of documents or records cannot properly be shown except by introducing the document itself, which is the best evidence."); *see, e.g.*, Lee v. Lee, 119 So. 2d 780, 648 (Miss. 1960) ("It is true that the plaintiff didn't offer to introduce the policy in evidence after being advised that her husband, Clyde Lee, had the policy . . . . The court was correct in holding that oral testimony was not competent to prove the terms and provisions of the policy . . . ."). For Mississippi's "best evidence" rule, see MISS. R. EVID. 1002 ("requirement of original").

[753] *See, e.g.,* Universal Computer Services, Inc. v. Lyall, 464 So. 2d 69, 76 (Miss. 1985) (recognizing viability of "best evidence" rule, but holding that it did not apply where written contract did not address certain terms of parties' agreement).

[754] *See* Jones v. Index Drilling Co., 170 So. 2d 564, 572 (Miss. 1965). *See, e.g.*, Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 546-47 (Miss. 1969) (holding that parol evidence was admissible to resolve defendant's claim that the copy of written contract tendered into evidence by plaintiff lacked an essential term that was present when defendant signed the contract).

> There would seem to be no question as to the admissibility of parol evidence to show an unauthorized alteration of a written instrument, the object of such evidence being not to vary the terms of the instrument but, on the contrary, to prove the terms thereof as originally executed.

Jones, 170 So. 2d at 572 (quotation omitted).

In *Jones v. Index Drilling Co.*,[756] the question for the court was whether the trial court had erred in permitting oral testimony by a client (Williams) to explain the scope of his written agreement with his attorney. While employed by Production Services, Inc., Williams was injured as a result of the negligence of one of Index Drilling's truck drivers.[757] Williams received worker's compensation benefits for approximately one year. Thereafter, he approached attorney Jones to ask whether he was entitled to additional worker's compensation benefits.[758] In October 1958, Williams signed a "Contract for Legal Services," assigning to Jones "an undivided one-fourth interest in said claim and also in and to all sum, or sums, received therefrom (one-third if the case is appealed)."[759]

Several months passed, during which Williams received no additional worker's compensation and, apparently, no word from Jones regarding his efforts to secure more benefits for Williams.[760] In August 1959, Williams consulted attorney Collins, who told Williams that he "would not interfere in the compensation matter" because Williams had already employed Jones to handle that, but Collins would take Williams's "third party suit against Index Drilling."[761] When Collins filed suit against Index Drilling on Williams's behalf, Jones attempted to intervene in order to establish his right to a share of any settlement or award[762]:

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[755] J.R. Watkins Co. v. Fornea, 100 So. 185, 187-88 (Miss. 1924).

[756] *Index Drilling*, 170 So. 2d 564 (Miss. 1965).

[757] *Id.* at 565.

[758] *Id.*

[759] *Id.* The contract, which was typewritten, except for two-and-one-half lines "which were underscored and filled in with pen and ink," *id.* at 567, and was signed by Williams, *id.* at 568, read in relevant part:

> For and in consideration of legal services rendered in my behalf in the prosecution of my claim against Index Drilling Co., Dapsco Inc., Martin Connection Works & Maryland Casualty Co. or any other person, firm or corporation I hereby assign and set over to W. Arlington Jones, Attorney, an undivided one-fourth interest in said claim and also in and to all sum, or sums, received therefrom. (one-third if case is appealed).
>
> I hereby authorize the above attorney, W. Arlington Jones, to prosecute this claim in my name, and I hereby ratify his actions in all things pertaining thereto.

Id.

[760] *Id.* at 565.

> Williams testified that he had been paid workmen's compensation after his injury, but payments had been stopped during the year 1957; and after waiting several months he went to see Mr. Jones and asked him about his workmen's compensation claim. He asked Mr. Jones, "Wasn't I entitled to some more workmen's compensation?" Mr. Jones told him he would have to look into the matter. Mr. Jones then handed him a sheet of paper that had two blank lines. Williams

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[761] *Id.* at 568.

[762] *Id.* The court continued:

> Jones testified that after the signing of the above mentioned contract he represented Williams in his claim for compensation for injuries received by him as a result of the accident referred to in the plaintiff's declaration. Jones was then asked whether he was presently employed by Williams. His answer was "No." He then identified and introduced in evidence a letter which he had received from Williams, postmarked October 17, 1959. The letter signed by Williams appears in the record, and is as follows:
>
>> Dear Mr. Jones:
>> This is to advise you that now that the Workmen's Compensation case against Martin Connection Works and Welding Shop that you handled for me has now been settled and you have been paid your fee in full and have been paid for your services in full, and I will not be in need of any further services from you. I am writing this letter to you in order that you will know that our relationship at attorney and client terminated as of the date of the settlement of the suit as mentioned above, and that I no longer retain you as my attorney in any wise.
>> Yours truly,
>> Charles Williams
>
> Jones stated that . . . he had been discharged and he understood that Williams had employed Judge Burkitt Collins to represent him. Jones stated that he had given notice to Index Drilling Company of the assignment which he held of a 25 percent interest in Williams' claim, that he had also given notice to the other corporations mentioned and the Maryland Casualty Company of his interest in the claim.

Id. at 568.

asked Mr. Jones what the paper was, and Mr. Jones said, "This is to give me authority to look into your medical reports * * * I cannot look into them without your permission." Williams was asked to examine the contract dated October 31, 1958, which he had signed and which Jones had offered in evidence during the hearing on September 6. Williams stated, "That is the contract with the exception of the pencil writing was not in there." Williams was asked to read that part of the instrument which he said was not in the instrument when he signed it. He then read the two and one-half lines of the contract which were filled in with a pen or a pencil. He stated that the two words "one-half", which appeared in the typewritten form, were blocked out and the words "one-fourth" were inserted in their place at the time he signed it. Williams was asked when that part of the instrument that was left blank, which was later written in by pencil, "When was that done?" His answer was, "It was done after I had left or sometime, because it was not in there when I signed the contract." Williams stated that about three or four months later he went back to see Mr. Jones, that his father went with him, and he asked Mr. Jones if anything had been done about his workmen's compensation. Mr. Jones advised him at that time that he had been paid and he could not receive anything else. Williams stated that he went back to see Mr. Jones again about two months later, and Mr. Jones again advised him that he did not have anything except workmen's compensation. Williams stated that his foot was hurting him and he went back to Mr. Jones' office a third time to see if he was not entitled to some more medical care, and Mr. Jones again told him that he had been paid all that he could be paid; that he then asked Mr. Jones, "Wasn't there any person or corporation that would be responsible for his accident other than Production Service?" And Mr. Jones told him, "No Sir."

Williams stated that he then went to see Judge Burkitt Collins; that he told Mr. Collins that he had given a contract to Mr. Jones for his workmen's compensation, and Mr. Collins would not advise him as to that; that Collins told him that he would not interfere with another lawyer's contract, but if he had not given his Index Drilling case to anyone he would take that. Williams stated that a few days after he had turned the matter over to Judge Collins he received word from Mr. Jones

> that he could settle his workmen's compensation claim for about $2000. That was after Judge Collins had filed suit against Index Drilling Company.
>
> At the conclusion of the hearing the court found that Jones had a contract with the plaintiff Williams to represent him in a workmen's compensation case, but the contract covered only the matter of workmen's compensation and had no relation to a third party suit; that Jones had no contract with Williams to represent him in a third party suit against Index Drilling Company for damages arising out of the injury for which he had received workmen's compensation . . . .[763]

On appeal, Jones argued that the trial court erred in permitting Williams to testify "as to the facts and circumstances surrounding the execution of the contract for legal services and the changes made in the written instrument after it was signed by Williams."[764] The supreme court disagreed:

> [W]e think there was no error in the court's admitting the testimony of Williams relating to the interview he had with Jones which led to the signing of the instrument and the fact that the blank spaces had not been filled in when the instrument was signed.
>
> . . . .
>
> Williams' testimony that the two and one-half lines of blank spaces in the typewritten instrument had not been filled in when he signed the instrument, that the words "one-half" were stricken out and the words "one-fourth" inserted in place of the words "one-half" before he signed the instrument, and that Jones said that the paper which he was requested to sign was needed to give him authority to look into Williams' medical reports, that he could not look into them without Williams' permission, shed light upon the meaning of the words "my claim" as used in the instrument which Jones prepared and which Williams signed. That testimony was uncontradicted, and in our opinion, lends support to Williams' contention that his employment of Jones as an attorney was limited to the prosecution of his claim for additional

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[763] *Id.* at 570-71.

[764] *Id.* at 572.

workmen's compensation only.[765]

If an instrument is signed with one or more terms left blank, parol evidence may be admissible to show that a term later filled in by one of the parties was not what was agreed to by both parties at the time the instrument was signed.[766] "A party who signs a blank piece of paper"—or, it would seem, a piece of paper with one or more blanks on it—"cannot be bound to the obligation written therein, unless it can be shown that he gave the person who wrote it"—or who filled in the blank(s)—"authority."[767]

11. Condition Precedent

A "condition precedent" is one "which must be performed before the agreement of the parties shall become a binding contract" or "which must be fulfilled before the duty to perform an existing contract arises."[768] Parol evidence of a condition precedent to a contract or contractual provision is generally admissible, irrespective of whether the contract or term is integrated or ambiguous.[769]

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[765] *Id.*

[766] *See* First Nat'l Bank of Jackson v. IDS Mortgage Corp., 353 So. 2d 775, 777-78 (Miss. 1978); Service Fire Ins. Co. v. Craft, 67 So. 2d 874, 876-77 (Miss. 1953). In *Craft*, the missing information was the amount of consideration to be paid for a release, *Craft*, 67 So. 2d at 876; in *IDS Mortgage*, it was the effective dates, amount, and recording data for a subordination agreement, *IDS Mortgage*, 353 So. 2d at 776-77. In both cases, the court found that parol evidence as to the terms left blank did not contradict the written instrument *as of the time it was signed. Id.* at 778; *Craft*, 67 So. 2d at 876. Therefore, the party contesting the written instrument was not prohibited "from showing by parol testimony the true intention of the parties." *IDS Mortgage*, 353 So. 2d at 778.

[767] *Craft*, 67 So. 2d at 877, *quoted with approval in IDS Mortgage*, 353 So. 2d at 778.

[768] Turnbough v. Steere Broad. Corp., 681 So. 2d 1325, 1327 (Miss. 1996). A condition precedent is distinguished from a "condition subsequent" for purposes of the parol evidence rule. A condition subsequent is "a condition referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition." BLACK'S LAW DICTIONARY 293-94 (6th ed. 1990).

[769] *See, e.g.*, Ohio Pottery & Glass Co. v. J.R. Pickle & Son, 66 So. 321, 322 (Miss. 1914).

> The general rule which excludes parol evidence, when offered to contradict or vary the terms, provisions, or legal effects of a written instrument, is subject to many qualifications. Among these qualifications is one to the effect that conditions relating to conditions precedent may be shown by extrinsic evidence. A party who concedes that the instrument evidencing the contract was placed in the possession of the party seeking relief, but claims that the latter took it with the understanding that it was not to go into effect until the happening of some other or further event, and that such event has not transpired, is not considered as one seeking to vary or contradict a written contract, but as one endeavoring to show that no contract between the parties ever in fact came into existence. For this reason, evidence of such conditions precedent is held admissible.[770]

In *Turnbough v. Steere Broadcasting Corp.*,[771] the appellees personally guaranteed the indebtedness and all interest due in accordance with a promissory note tendered for the radio station. The personal guaranty stated that it could "only be enforced after the default procedures specified in the Security Agreement" between Turnbough and the Caravelle Broad-

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> Where parties to a writing which purports to be an integration of a contract between them orally agree, before or contemporaneously with the making of the writing, that it shall not become binding until a future day or until the happening of a future event, the oral agreement is operative if there is nothing in the writing inconsistent therewith.

Plant Flour Mills Co. v. Sanders & Ellis, 157 So. 713, 714 (Miss. 1934).

[770] *Ohio Pottery*, 66 So. at 322 (quoting 2 WILLIAM F. ELLIOTT, ELLIOTT ON CONTRACTS ¶ 1636 (1913)). *But cf.* Paoli v. Anderson, 208 So. 2d 167, 168 (Miss. 1968) (holding that, where the written instrument "contained no conditions or restrictions on its effectiveness," permitting plaintiff "to set up a condition by parol evidence would contradict her deed, which is unambiguous on its face"; and, therefore, "such parol evidence as to conditional delivery" was inadmissible). The holding in *Paoli* may be explained by a special rule applying to deeds. The court mentions "the importance of stability of title[]" to real property among its rationale for its holding. *Id.* at 169. But, to the extent that the court has generally construed deeds according to the same rules as contracts, and vice versa, *Paoli* may have broader application.

[771] 681 So. 2d 1325 (Miss. 1996)

cast Group had been observed[772]:

> There was little evidence presented as to whether the parties ever intended to have a security agreement executed. When asked about the security agreement, Alfred Koenenn, Turnbough's attorney during closing, testified that Turnbough discussed the execution of a security agreement with Caravelle, but realized that such execution was "impossible." Therefore, "the personal guaranties of the limited partners was accepted rather than any kind of security agreement, either for the personal property or mortgage on the real property which was sold." There was no testimony presented by any of the members of Caravelle. The evidence does not contain any other reference to any security agreement or default procedures within any type of agreement. Therefore, the only indication of the parties' intent is Koenenn's testimony as to what Turnbough may have told him during closing.[773]

The Mississippi Supreme Court reversed the circuit court's grant of summary judgment for the guarantors, holding that the language of the personal guaranty was "ambiguous as to whether the parties intended that the execution of a security agreement operate as a condition precedent to performance under the personal guaranty"[774] and, therefore, summary judgment was inappropriate.[775]

According to the *Restatement (Second) of Contracts*, "where the parties to a written agreement agree orally that performance of the agreement is subject to the occurrence of a stated condition, the agreement is *not integrated with respect to the oral condition*."[776] The commentary to the *Restatement (Second) of Contracts* elaborates:

> [A]n oral requirement of a condition is never completely consistent with a signed written agreement which is complete on its face; in such cases evidence of the oral requirement bears

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[772] *Turnbough*, 681 So. 2d at 1327.

[773] *Id.* at 1328.

[774] *Id.* at 1325.

[775] *Id.* at 1328.

[776] RESTATEMENT (SECOND) OF CONTRACTS § 217 (1981).

> directly on the issues [of] whether the writing was adopted as an integrated agreement and if so whether the agreement was completely integrated or partially integrated . . . . If the parties orally agreed that performance of the written agreement was subject to a condition, either the writing is not an integrated agreement or the agreement is only partially integrated until the condition occurs. Even a "merger" clause in the writing, explicitly negating oral terms, does not control the question [of] whether there is an integrated agreement or the scope of the writing.[777]

12. Subsequent Acts or Agreements

The parol evidence rule excludes only extrinsic evidence of prior or contemporaneous oral agreements and prior written agreements.[778] Evidence of occurrences after the contract is executed is not excluded by the rule.[779]

a. Subsequent Conduct

What the parties to a contract do thereunder "is relevant extrinsic evidence, and often the best evidence, of what the contract requires them to do."[780] The "construction placed upon an instrument by the parties thereto is entitled to very great weight in reaching the intent and purpose of the instrument."[781] The parties' subsequent conduct "may support a finding that the original contract has been modified to an extent consistent with the subsequent course of conduct."[782]

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[777] *Id.* § 217 cmt. b; *see also* Plant Flour Mills Co. v. Sanders & Ellis, 157 So. 713, 714 (Miss. 1934) ("The stipulation in the contract that it 'constitutes the complete agreement between the parties hereto and cannot be changed in any manner whatsoever without the written consent of both buyer and seller' is not inconsistent with the oral agreement that it should not become operative until approved by Ellis & Sanders.").

The *Restatement* advises further that "[a] major rationale expressed by the courts for the rule of this Section is that it has to do with an oral condition that must occur before the written contract comes into existence. Thus, if the oral condition is not met *there is no subsequent and superseding agreement* and no reason to apply the parol evidence rule." RESTATEMENT (SECOND) OF CONTRACTS § 217 reporter's note to cmt. b, at 143 (emphasis added).

[778] *See supra* text accompanying note 572. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 212.

[779] *See* Kelso v. McGowan, 604 So. 2d 726, 731 (Miss. 1992); *supra* subpart III.A.2.c.

[780] Kight v. Sheppard Bldg. Supply, Inc., 537 So. 2d 1355, 1358 (Miss. 1989); *see also, e.g.*, UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc., 525 So. 2d 746, 754 (Miss. 1987) ("Where what the parties have said is less than clear and definite in material part, the court may resort to extrinsic aids to as-

In *Delta Wild Life & Forestry, Inc. v. Bear Kelso Plantation, Inc.*,[783] the question for the court was whether the lessee's assignee, Bear Kelso, was obligated to quit the leased premises because Bear Kelso was using the leased premises for crop farming rather than pasturage, as was provided for in the original lease:

> The lease, originally entered into by Delta, lessor, and G. L. Johnson, lessee, on August 21, 1962, provided for annual rental payments of $2,500 per year and was for an initial five-year period with the privilege of lessee to renew same for four successive five-year periods at a rental of $2,500 per year. It also provided that if any of the described premises should, during the term of the contract or any renewal thereof, be assessed for ad valorem taxes at a value "*in excess of that at which uncultivatable land in Issaquena County is assessed*" that the lessee, in addition to the annual rental specified, would pay the increase in as valorem taxes thereby imposed as additional rental.

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sign meaning to contract terms . . . . [O]ne of those extrinsic aids should be the construction which the parties themselves have given to a contract in the course of their life together under it." (citation omitted)); Sumter Lumber Co. v. Skipper, 184 So. 296, 298-99 (Miss. 1938) ("[W]hen the parties have for some time proceeded with or under the deed or contract, a large measure, and sometimes a controlling measure, of regard will be given to the practical construction which the parties themselves have given it, this on the common sense proposition that actions generally speak even louder than words."); Yazoo & Miss. Valley R.R. v. Lakeview Traction Co., 56 So. 393, 395 (Miss. 1911) ("We must look to and consider the contemporaneous construction which the parties themselves place upon the instrument. In cases of ambiguity, this contemporaneous interpretation becomes of great value, and frequently is decisive.").

[781] A. & S. Spengler v. Stiles-Tull Lumber Co., 48 So. 966, 968 (Miss. 1908). See *supra* subpart II.C.8 for more discussion of construing and interpreting a written contract in light of the parties' performance of the contract.

[782] *Kight*, 537 So. 2d at 1359. *See* Stinson v. Barksdale, 245 So. 2d 595, 597-98 (Miss. 1971).

[783] 281 So. 2d 683 (Miss. 1973).

> Said lease also provided, among other things, that: LESSEE shall have the right and privilege to put any part or all of said land in pasture, and to erect such fences or other improvements thereon as Lessee may need in and about such operations, and may remove at Lessees (sic) option such fences or improvements at the termination hereof.

At the time G. L. Johnson entered into the above mentioned lease, he and his brother, Wendell Johnson . . . were raising cattle on what was described by the witnesses as woods pasture. After leasing the 1,240 acres in question, they fenced these lands and ran cattle thereon until sometime prior to the middle of 1964 by which time they had sold all of the cattle. During this same period, beginning in 1963, the Johnsons began to clear all of the trees and buck vines from the leased lands and converted them into cultivated row crop lands for the purpose of growing soybeans. Prior to being cleared, a large portion of the land was covered with timber, the value of which was estimated at some $23,370. It was estimated that the cost of clearing the land would run between $75 and $90 per acre, and that the total cost of drainage structures was approximately $30,000. The total of this being well in excess of $100,000 . . . .

. . . .

. . . [A]fter observing the Johnsons' successful soybean operations . . . , by a second lease, Delta cleared and leased to Johnson additional acres known as the "thousand acre deadening," being between 1,000 and 1,200 acres. This second lease to the Johnsons did not prohibit a sublease and they sublet it in part to Claude Cook and in part to W. L. and Lee Braxton. On January 10, 1967, when the second lease had about four years to run, Delta decided after negotiations to allow the Johnsons to sublease the disputed 1962 lease on certain conditions. Delta's corporate minutes of that date provide:

. . . .

> 2. RESOLVED, . . . Delta Wild Life shall amend that certain written lease from Delta Wild Life to G. L. Johnson and Wendell Johnson . . . so as to grant the said G. L. and Wendell Johnson the right to sublease said premises, *provided said premises be kept in a good*

> *state of cultivation and properly farmed by the sublessee.*
>
> . . . .
>
> On August 11, 1967, G. L. "Doc" Johnson advised Delta by letter that he was exercising his option to renew the disputed 1962 lease for an additional five years and enclosed his check in the amount of $2,500 which check was accepted and cashed by Delta. Thereafter, the 1968 annual rental was paid and the check therefor was deposited to Delta's account on August 16, 1968.
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> G. L. "Doc" Johnson died on November 4, 1968, and on November 19, 1968, Wendell H. Johnson, his partner, and Mrs. Jeryl T. Johnson, his widow and sole devisee and legatee, quitclaimed to the appellee, Bear Kelso, their rights as lessee to the 1962 lease in question. Agricultural operations continued as usual on the leased properties. Then, on August 19, 1969, Delta forwarded to Bear Kelso a notice to quit on the 1962 lease, giving a number of reasons why the lease had been breached. The appellee, Bear Kelso, refused to quit the leased land and has remained in possession and continued to row crop its property until the present. Suit was filed on August 26, 1971.[784]

After setting forth these pertinent facts, the court turned to Delta's argument that Bear Kelso was in violation of the "pasturage" requirement of the lease because Bear Kelso was using the land for row crops:

> It is undisputed that in early 1963 the Johnsons began clearing the land in question at considerable expense to themselves and that this was known by officers of Delta and that virtually all of the clearing had been completed in 1964. With this knowledge, Delta accepted the annual rental payments each year, and in 1967, after negotiations, the Johnsons were allowed to sublet and assign the questioned lease, and speaking through its minutes, Delta expected, among other things, that the leased premises "be kept in a good state of cultivation and properly farmed." Such a provision is wholly inconsistent with Delta's present contention

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[784] *Delta Wild Life*, 281 So. 2d at 683-85 (emphases deleted).

> that the land was to be used for pasture only. Further, Delta's agreement to allow the Johnsons to sublease the property was granted only after the Johnsons agreed to give up valuable leases that they had on other properties belonging to Delta and which Delta immediately released to third parties at a considerable profit. If a bona fide serious dispute existed between the parties as to the interpretation of the lease then certainly it would have manifested itself in the terms of this new agreement. Also, the satisfaction of Delta with the arrangement between the parties, which had been going on for several years, was further evidenced by the acceptance by Delta, without protest, in 1967 of a notice by Johnson of renewal of the lease for an additional five years and the acceptance of the annual rental payment of $2,500 at that time and again in 1968. It was not until August, 1969, after G. L. Johnson died and after the lease had been quitclaimed to Bear Kelso that Delta decided that the Johnsons had breached the lease. This decision comes too late. The contemporaneous construction placed upon the instrument by the parties thereto is entitled to very great weight in reaching the intent and purpose of the instrument. It is evident from the acts of the parties themselves covering many years that they contemplated that these lands covered by the 1962 lease would be converted to row crop use. The lease itself provided that the lessee would pay any increase in taxes resulting from an assessment of taxes in excess of that at which uncultivated land in Issaquena County is assessed.[785]

b. Abandonment of Contract

Extrinsic evidence may also be admitted to prove that one or both parties abandoned a contract at some date after its execution.[786] In such a case, extrinsic evidence may be admitted even in the face of an unambiguous, fully integrated, written contract.[787]

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[785] *Id.* at 686 (citations omitted).

[786] *See* Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 547 (Miss. 1969) ("Rights acquired under a contract may be abandoned . . . by . . . conduct clearly indicating such purpose. Intent to abandon . . . may be inferred from conduct of the parties which is inconsistent with the continued existence of the agreement.").

c. *Subsequent Oral Modification*

The parol evidence rule does not bar extrinsic evidence regarding subsequent oral modification of a prior written agreement.[788] Nor does it preclude extrinsic evidence of an oral agreement to waive or modify a particular provision in a written contract.[789]

In *Albert Mackie & Co. v. S.S. Dale & Sons*,[790] the written contract was for the purchase of six carloads of potatoes. The defendant argued that, by a subsequent parol agreement, the plaintiff agreed to accept and the defendant agreed to deliver only three carloads instead of six.[791] The court held:

> [S]trict performance of a written contract within the statute of frauds may be waived by a parol understanding or by words and acts inconsistent with an intention to require performance where the other party has been misled or kept from performing . . . .

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[787] *Id.* at 545-46.

[788] *See* Williamson v. Metzger, 379 So. 2d 1227, 1229 (Miss. 1980); St. Louis Fire & Marine Ins. Co. v. Lewis, 230 So. 2d 580, 581-82 (Miss. 1970); Flowood Corp. v. Chain, 152 So. 2d 915, 920 (Miss. 1963); Commercial Credit Corp. v. Long, 82 So. 2d 847, 848 (Miss. 1955); *see also* Lusk-Harbison-Jones, Inc., v. Universal Credit Co., 145 So. 623, 624 (Miss. 1933) ("[A] subsequent oral agreement to modify a prior written contract is valid and proof thereof does not violate the parol evidence rule, especially where the subsequent agreement is acted upon.").

[789] *See Williamson*, 379 So. 2d at 1229; *Long*, 82 So. 2d at 848; Oden Constr. Co. v. Helton, 65 So. 2d 442, 446 (Miss. 1953).

As the court observed in *Lee v. Hawks*, 9 So. 828, 828 (Miss. 1891):

> The statute of frauds debars one of an action on a contract, in certain cases, unless the contract be in writing; but a parol agreement to annul or waive a particular stipulation in the written contract which has been mutually assented to and fully performed, may be offered in evidence in defense of an action for a breach of the original written contract. An action may not be maintained, in cases within the statute, upon a contract not in writing; but a defense may be made by showing an executed parol agreement waiving or annulling a particular provision of the written contract.

Id. at 828, *quoted with approval in Williamson*, 379 So. 2d at 1229.

[790] 84 So. 453 (Miss. 1920).

[791] *Albert Mackie & Co.*, 84 So. at 453-54.

> . . . .
>
> The simple contention is made that the purchaser agreed to accept one-half of the property contract to be delivered and waive performance as to the other half. It is immaterial whether this action be termed a waiver, modification, or release. The parties acted upon the parol agreement, and, if the testimony on behalf of appellee be true, it would be very inequitable to award damages in this case.[792]

A no-oral-modification clause may be waived by a party either by accepting non-written changes from the other party or by making non-written changes.[793] The question of whether or not the parties waived the requirement of a writing is a question for the trier of fact.[794]

d. Rescission

A prior written contract may be rescinded by subsequent oral agreement or subsequent conduct.[795] While rescission may be inferred from conduct, as opposed to an agreement between the parties,

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[792] *Id.* at 454-55; *accord Williamson*, 379 So. 2d at 1229-30 (holding that parol evidence was admissible to prove the assent of the lessors to a substituted mode of performance of the original lease).

[793] The Mississippi Supreme Court has often recognized the validity of a subsequent oral modification, even where the prior written contract requires that any modification be in writing. *See, e.g.*, Singing River Mall Co. v. Mark Fields, Inc., 599 So. 2d 938, 946 (Miss. 1992); Eastline Corp. v. Marion Apts., Ltd., 524 So. 2d 582, 584 (Miss. 1988); Shaw v. Burchfield, 481 So. 2d 247, 253 (Miss. 1985). *But see* MISS. CODE ANN. § 75-2-209(2) (1981) ("A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded . . . ."). The Mississippi Supreme Court wrote that

> [f]or a subsequent agreement to modify an existing contract, the later agreement must, itself, meet the requirements for a valid contract. Since a contract modification must have the same essentials as a contract, a binding post-contract agreement must fulfill the requirements of a contract regardless of whether a party characterizes it as a modification or a stand-alone contract.

Singing River Mall, 599 So. 2d at 947 (citations omitted).

[794] *Id.* at 946; *Eastline*, 524 So. 2d at 584; Green v. Pendergraft, 179 So. 2d 831, 836 (Miss. 1965).

[795] *See* Broome Constr. Co. v. Beaver Lake Recreational Ctr., Inc., 229 So. 2d 545, 547 (Miss. 1969); Sammons Communications, Inc. v. Polk, 429 So. 2d 564, 567 (Miss. 1983).

> notice for the rescission or termination of a contract must be clear and unambiguous, conveying an unquestionable purpose to insist on the cancellation. To effect a rescission, an affirmative act on the part of the person desiring to rescind is necessary. Although notice of rescission need not consist of a formal written notice, the declaration or acts constituting rescission must be definite and unequivocal and clearly indicate the right asserted.[796]

Merely ignoring or disregarding the terms of a contract may not be sufficient to constitute rescission.[797]

Extrinsic evidence offered to prove the rescission may be admitted even in the face of an unambiguous, fully integrated, written contract.[798]

In *Renfroe v. Aswell*,[799] Aswell and Renfroe were partners in a sawmill. Renfroe executed four notes, totaling $1,000, which Aswell claimed represented Renfroe's purchase of Aswell's half of the business.[800] When Renfroe did not pay, Aswell sued. At trial, Renfroe offered to prove that, after he executed the notes but was unable to borrow the rest of the money he needed to complete the purchase and pay off outstanding debts of the partnership, he and Aswell

> got together and had a further parol understanding that the purported sale would be, and was, rescinded by mutual agreement, and that pursuant thereto Aswell was redelivered his half interest in the business and property, and that the parties jointly took charge of the property and assets and sold the same and applied the proceeds of the sale to payment of the partnership debts.[801]

The supreme court concluded that the trial court erred by excluding that proof:

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[796] U.S. Fin. Co. v. Barber, 157 So. 2d 394, 398 (Miss. 1963).

[797] Wiener v. Pierce, 203 So. 2d 598, 603 (Miss. 1967).

[798] *Broome Construction*, 229 So. 2d at 545-46.

[799] 21 So. 2d 812 (Miss. 1945).

[800] *Renfroe*, 21 So. 2d at 812.

[801] *Id.* at 813.

> Evidence is generally admissible to show a subsequent parol agreement, valid under the law and effective as to its subject matter, between the parties to a written instrument, although it may alter or abrogate such writing, and especially so where such parol agreement is acted upon by the parties.[802]

e. Novation

A novation "is a contract that discharges at once an existing obligation and creates a new contractual obligation" and substitutes at least one party to the original contract with "a party who was not previously obligated."[803] A novation "may be implied from the circumstances absent an express substitution."[804] However, implied novation requires "substantial proof" that the surviving party from the original contract "impliedly accepted" the new party in lieu of the party to the original contract the new party seeks to replace.[805] The party asserting novation bears the burden of proving it.[806] The determination of whether there has been a successful novation—and particularly a successful implied novation—is a question of fact.[807]

The Mississippi Supreme Court explored novation—both express and implied—at length in *Mississippi Motor Finance Co. v. Enis*:[808]

> On June 22, 1962, defendant [Enis] purchased a 1962 Rambler from Safety Motors . . . [and] executed to Safety Mo-

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[802] *Id.*

[803] First Am. Nat'l Bank of Iuka v. Alcorn, Inc., 361 So. 2d 481, 487 (Miss. 1978). *See* Mississippi Motor Fin., Inc. v. Enis, 181 So. 2d 903, 904 (Miss. 1966). Without a change in at least one of the parties, there is no novation. *See, e.g.*, Hoerner v. First Nat'l Bank of Jackson, 254 So. 2d 754, 760 (Miss. 1971).

[804] *First American*, 361 So. 2d at 487-88. *See* American Blakeslee Mfg. Co. v. Martin & Son, 91 So. 6, 6 (Miss. 1922).

[805] *See First American*, 361 So. 2d at 488.

[806] Morgan v. Jackson Ready-Mix Concrete, 157 So. 2d 772, 780 (Miss. 1963).

[807] *See First American*, 361 So. 2d at 488; Giles v. Friendly Fin. Co. of Biloxi, 185 So. 2d 659, 661 (Miss.), *appeal dism'd*, 385 U.S. 21 (1966); *Morgan*, 157 So. 2d at 780; *American Blakeslee*, 91 So. at 6-7.

[808] 181 So. 2d 903 (Miss. 1966).

tors a conditional sales contract for $4,172.80, payable in twenty-four monthly installments. Failure to pay any installment accelerated the entire debt. The conditional sales contract was assigned . . . to plaintiff, with recourse . . . .

. . . .

On June 28, 1963, defendant purchased a 1963 Rambler from W.H. Cooper, doing business as Safety Motors, and executed to Safety Motors a conditional sales contract for the full purchase price . . . . Cooper had told a representative of plaintiff, prior to the purchase by defendant of the 1963 Rambler, that the trade would be made and that he, Cooper, would pay off the balance due on the 1962 Rambler when he sold it. A representative of plaintiff knew when the trade was consummated between Cooper, doing business as Safety Motors, and defendant, and that the 1962 Rambler was on the yard of Safety Motors after the transaction. As between Cooper and defendant it was agreed that Safety Motors would pay off the balance due on the 1962 Rambler, and words to that effect were written by Cooper on the invoice. Plaintiff did not receive this invoice.

After the trade on June 28, 1963, two payments on the 1962 Rambler for the months of July and August, 1963, were made by defendant, but he testified that the money was furnished him by Cooper.

Cooper . . . went out of business [in 1963]. He sold the 1962 Rambler and failed to pay plaintiff. Plaintiff sued defendant Enis for the balance due on the conditional sales contract for the 1962 Rambler.

A novation involving substitution of debtors is a contract that (a) discharges immediately an existing contractual obligation, (b) creates a new contractual obligation by, (c) including as the new obligor a party who was not previously obligated. The contract of novation is a mutual undertaking among all parties concerned.

In order to establish his affirmative defense of novation, it was necessary for defendant Enis to prove (a) that he, Enis, was immediately discharged from the obligation to pay the debt evidenced by the conditional sales contract for the 1962 Rambler, (b) a new contractual obligation was created between plaintiff and Cooper, whereby Cooper would become liable to plaintiff, and (c) that Cooper was not previously

> obligated to plaintiff on the conditional sales contract for the 1962 Rambler.
>
> There was no express agreement that Enis was released from payment of the debt, evidenced by the conditional sales contract, for the purchase of the 1962 Rambler. No new contractual obligation between Cooper as debtor and plaintiff as creditor was created in connection with the trade between Cooper and Enis . . . . Cooper was already liable to plaintiff on the 1962 contract by reason of his assignment thereof with recourse. For the same reason, defendant failed to prove that Cooper was not previously obligated on the 1962 contract. We find no evidence of an express contract of novation.
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> . . . . [N]ovation may be implied where the facts and circumstances demonstrate that it was the intention of the parties to substitute one party for another . . . . The circumstances relied upon by Enis as establishing a novation by implication include the fact that Cooper told the manager of plaintiff that he was going to trade with Enis and that he, Cooper, would pay off the indebtedness on the 1962 Rambler. The manager of plaintiff knew the trade was made, and knew the 1962 Rambler was on Safety Motors' lot . . . . Plaintiff's manager talked to Cooper a number of times after the trade between Cooper and Enis, and requested Cooper to pay off the balance due on the 1962 Rambler. The conditional sales contract involved in this case was one of many Cooper had assigned to plaintiff, and a representative regularly went over these accounts with Cooper. The payments for the months of July and August were made by Enis, although Cooper furnished Enis the money. We are of the opinion that all that was said and done by the parties was consistent with Enis' remaining liable for the indebtedness on the 1962 Rambler. The evidence did not justify a finding of novation by implication. Plaintiff continued to hold the original conditional sales contract. There was no new document signed. The agreement between Cooper and Enis that Cooper was to pay the balance on the contract and plaintiff's knowledge of it was no proof that plaintiff intended to release Enis . . . .[809]

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[809] *Enis*, 181 So. 2d. at 903-05 (citations omitted).

C. The Common Law Parol Evidence Rule in Action: A Simplified Checklist[810]

> *Few subjects connected with the interpretation of contracts present so simple and uniform a statement of principle, bedeviled by such a perplexing and harassing number of difficulties in its application, as the parol evidence rule.*[811]

While the parol evidence rule may be easy to recite, it is much more difficult to pin down in practice. As discussed previously, and as is apparent from the foregoing statements of the parol evidence rule, before a trial court reaches the question of whether evidence offered regarding a prior agreement or prior discussions will be admitted before the trier of fact, the court must make the following threshold determinations:

(1) Is there a written agreement covering the subject matter of the proffered extrinsic evidence?

(2) If so, does the written agreement constitute the final agreement of the parties regarding the subject matter of the proffered extrinsic evidence?[812]

(3) If so, does the written agreement constitute the complete and exclusive agreement of the parties regarding the subject matter of the proffered extrinsic evidence?[813]

(4) If so, is the final and complete written agreement unambiguous?[814]

(5) If so, does the proffered extrinsic evidence concern a prior or contemporaneous oral term or agreement or a prior written term or agreement?[815]

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[810] This checklist is adapted from Glasser & Rowley, *supra* note 10, at 743-45. *See generally* Arthur L. Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 603-10 (1944); HUNTER, *supra* note 5, §§ 7:6-7:8.

[811] 4 JAEGER, *supra* note 607, § 632A, at 984.

[812] That is to say: Is the written agreement *integrated*? *See supra* notes 70-73 and accompanying text.

[813] That is to say: Is the integrated written agreement *fully integrated*? *See supra* notes 74-77, 83-86 and accompanying text.

[814] *See supra* subpart II.A.

[815] *See supra* note 572 and accompanying text; subpart III.A.2.c.

(6) If so, does the proffered extrinsic evidence contradict, vary, or supplement some term of the written agreement that the court has previously determined to be unambiguous, final, and complete?[816]

If the answer to *any* of the foregoing questions is "No," then the parol evidence rule *does not* prevent the trier of fact from considering some or all of the proffered extrinsic evidence.[817] If the answer to all of the foregoing questions is "Yes," then the trial court must answer the following additional question:

(7) Does the proffered extrinsic evidence, which is otherwise subject the parol evidence rule, fit within one or more of the numerous exceptions to the rule?[818]

If so, then, again, the parol evidence rule should not prevent the trier of fact from considering the proffered extrinsic evidence. If not, *and only if not*, then the parol evidence rule properly bar the trier of fact from considering the proffered extrinsic evidence.

In answering the foregoing questions, a Mississippi trial court appears to be bound by the three-tiered process prescribed in *Pursue Energy Corp. v. Perkins.*[819]

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[816] *See supra* notes 572-73 and accompanying text; subparts III.A.2.a-.b.

[817] Briefly: (1) The parol evidence rule does not apply in the absence of a written agreement. *See supra* note 605 and accompanying text. (2) The parol evidence rule does not apply to unintegrated agreements, even if they are in writing. *See supra* subpart III.A.3.c. (3) If the written agreement is not fully integrated, the parol evidence rule does not bar evidence offered to add to, clarify, explain, or give meaning to the writing, as long as the proffered evidence does not vary or contradict any terms of the writing that are integrated. *See supra* subpart III.A.3.a. (4) Even if the written agreement is fully integrated, and more so if it is less-than-fully integrated, the parol evidence rule does not bar evidence offered to resolve any ambiguity, as long as the proffered evidence does not vary or contradict any terms of the writing that are both integrated and unambiguous. *See supra* subpart III.A.3.b. (5) Even if the written agreement is both integrated and unambiguous, the parol evidence rule, by its own terms, does not bar evidence of subsequent oral or written agreements. *See supra* subpart III.A.2.c. (6) Even if the written agreement is both integrated and unambiguous, the parol evidence rule, by its own terms, does not bar evidence that is offered merely to explain, not to add to, contradict, vary, or change, a written agreement, nor does the rule bar extrinsic evidence regarding collateral agreements or writings that are not "contractual in nature." *See supra* notes 601-02, 604 and accompanying text; subparts III.A.2.a-.b.

[818] *See supra* subpart III.B.

These questions should be raised and resolved as early in the case as possible, as they will govern the extent and types of evidence that may be submitted to the trier of fact, as well as the extent to which the written agreement will be open to interpretation.[820]

D. Special Case: Contracts for the Sale or Lease of Goods

> *[T]he meaning of commercial contracts is not necessarily to be found exclusively within the four corners of the document but must take into account the commercial circumstances surrounding the transaction. . . . The court . . . should recognize that the words selected by the parties may have a special meaning to them or to the trade in which they operate and that some terms may have been omitted from the formal contract, because they are so well understood by the parties that putting them into the final writing was deemed unnecessary. Indeed, some aspects of the agreement may be so clear to the parties that suggesting that these terms be written into the contract would be insulting. These "missing" terms are really implied parts of the agreement which in many cases may be ascertained by resort to course of performance, course of dealing or usage of trade.*[821]

The Mississippi Uniform Commercial Code codifies the parol evidence rule pertaining to contracts for the sale[822] or

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[819] 558 So. 2d 349 (Miss. 1990). *See supra* notes 21-28 and accompanying text.

[820] *See generally* HUNTER, *supra* note 5, §§ 7:8, at 7-14.

[821] 1 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 1-205:2, at 1-246 to -247 (1998) (footnote omitted).

[822] The statute reads:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set for in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (1) by course of dealing or usage of trade (Section 1-205) [§ 75-1-

lease[823] of goods. These codified versions of the parol evidence

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> 205] or by course of performance (Section 2-208) [§ 75-2-208]; and
>
> (2) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

MISS. CODE ANN. § 75-2-202 (1981). Other than the addition of parenthetical cross-references to the Mississippi Code versions of Sections 1-205 and 2-208, the Mississippi Code version of Section 2-202 is identical to the "uniform" version. *Compare id. with* UNIFORM COMMERCIAL CODE § 2-202 (1999).

Contracts for the sale of goods between a Mississippi resident and a resident of a foreign country may be governed by the 1980 United Nations Convention on the International Sale of Goods ("CISG"). *See* United Nations Convention on the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18, Annex I, *reprinted in* 19 I.L.M. 668. The CISG does not apply if the foreign buyer or seller's place of business or "habitual residence" is in a country that has not ratified the CISG. *See id.* arts. 1(1)(a) &10(b). The CISG does not apply if, even though the foreign buyer or seller's place of business or habitual residence is in a country that has ratified the CISG, if the Mississippi buyer or seller neither knew nor had reason to know that it was dealing with a party whose place of business or habitual residence was in a foreign country. *See id.* art. 1(2). Nor does the CISG apply to contracts for goods being purchased for personal, family, or household use where the seller neither knew nor had reason to know at any time prior to or at the conclusion of the contract of the goods' intended use by the buyer. *See id.* art. 2(a). Parties to a contract that would otherwise be governed by the CISG may contractually agree not to be governed by it in part or in whole, *see id.* art. 6, subject to certain limitations, *see id.* art. 12.

The CISG provides that "[a] contract of sale need not be concluded in or evidenced by writing and . . . may be proved by any means, including witnesses." *Id.* art. 11; *see also id.* art. 8(3) ("In determining the intent of a party . . . , due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."). The few courts to have considered these provisions of the CISG, have read them to mean that the CISG has no parol evidence rule. *See, e.g.*, MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, 144 F.3d 1384, 1389-90 (11th Cir. 1998); Mitchell Aircraft Spares, Inc. v. European Aircraft Service AB, 23 F. Supp. 2d 915, 919-20 (N.D. Ill. 1998); Claudia v. Olivieri Footwear Ltd., 1998 WL 164824, at *4-6 (S.D.N.Y. Apr. 7, 1998).

There are no reported Mississippi state or federal cases addressing the CISG, and a discussion of construing and interpreting contracts subject to the CISG is beyond the scope of this article. The point of raising the issue of the CISG here is to make the reader aware of its existence and possible application to certain contracts that would otherwise be governed by Article 2 of the Mississippi Uniform Commercial Code. *See* Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992) (holding that the CISG "trumps" the UCC in cases where the CISG applies), *appeal dism'd*, 984 F.2d 58 (2d Cir. 1993).

[823] *See* MISS. CODE ANN. § 75-2A-202 (Supp. 1998). Section 2A-202 is identical

rule are presumed to "trump" common law approaches to construing and interpreting contracts – *even fully integrated contracts* – for the sale[824] or lease[825] of goods.

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to Section 2-202, *supra* note 822, except for the parenthetical cross-references.

For a discussion of parol evidence issues under Article 2A, see WILLIAM H. LAWRENCE & JOHN H. MINAN, THE LAW OF PERSONAL PROPERTY LEASING ¶ 4.02, at 4-18 to -35 & S4-3 to -8 (1993 & Supp. 1999).

[824] The Uniform Commercial Code clarifies, for purposes of disputes over contracts for the sale or lease of goods, that the language used in a written contract should be afforded "the meaning which arises out of the commercial context in which it was used," rather than the meaning that might be attributed to it "by rules of construction existing in the [common] law." UNIFORM COMMERCIAL CODE § 2-202 cmt. 1(b).

Contracts for the sale or lease of goods

> are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. *Unless carefully negated they have become an element of the meaning of the words used.* Similarly, the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.

Id. § 2-202 cmt. 2 (emphasis added). The Code "rejects both the 'lay-dictionary' and the 'conveyancer's' reading of a commercial agreement. Instead the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted *in light of commercial practices* and other surrounding circumstances." *Id.* § 1-205 cmt. 1 (emphasis added). And the "measure and background for interpretation are set by the commercial context *which may explain and supplement even the language of a [fully integrated] writing.*" *Id.* (emphasis added). *Compare* Franz Chem. Corp. v. Philadelphia Quartz Co., 594 F.2d 146, 149 (5th Cir. 1979) (outlining the various parol evidence provisions in Texas's analogy to § 75-2-202 and their effects on the issues before the court) *with* Citizens Nat'l Bank of Meridian v. L.L. Glascock, Inc., 243 So. 2d 67, 70-71 (Miss. 1971) (refusing to consider evidence of custom and usage in construction industry, under pre-Code law, when doing so would result in a different construction of the contract than that afforded by a "plain meaning" approach).

As the Fifth Circuit explained nearly thirty years ago:

> [E]vidence of course of dealing and usage of trade [is] necessarily and properly admissible to explain, qualify, or supplement the provisions of [the] written agreement. In providing for the admission of such evidence, the [UCC] manifests the law's recognition of the fact that perception is conditioned by environment: unless a judge considers a contract in the proper commercial setting, his view is apt to be distorted or myopic, increasing the probability of error.

Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1046 (5th Cir. 1971).

[825] There is no corresponding comment to Section 2A-202. Rather, the Official Comment for that section merely refers the reader to Section 2-202. UNIFORM

1. Similarities to the Common Law Parol Evidence Rule

As is true at common law,[826] the Code's parol evidence rules governing written contracts for the sale or lease of goods bar extrinsic evidence of prior or contemporaneous oral agreements or representations and prior written agreements or representations to the extent that such evidence *contradicts* the terms of an integrated writing.[827]

For example, in *General Plumbing & Heating, Inc. v. American Air Filter Co.*,[828]

> the written quotation-contract prepared by American and accepted by General was specifically made subject to terms and conditions that included (1) the quotation was expressly limited to the terms within the document, with "no understandings, agreements, or obligations (outside of this quotation) unless specifically set forth in writing"; and (2) any quoted shipping date or acknowledgment was American's best estimate but that American made no guarantee of shipment by that date and assumed no obligation for failure to ship on such date.[829]

General sued American for breach of contract, claiming that American agreed that it would deliver the equipment within six weeks of the order or, at least, by a date sufficient

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COMMERCIAL CODE § 2A-202 cmt.

[826] *See supra* note 572 and accompanying text.

[827] *See* MISS. CODE ANN. § 75-2-202 (1981); MISS. CODE ANN. § 75-2A-202; *see, e.g.*, Security Mut. Fin. Corp. v. Willis, 439 So. 2d 1278, 1282 (Miss. 1983) (reversing the trial court's ruling admitting extrinsic evidence because "the parol evidence was not in explanation of or supplementary to the contemporaneous writing but rather was contradictory to it"); U.S. Axminster, Inc. v. Directions in Design, Inc., 1996 WL 671403, at *3 (N.D. Miss. Oct. 24, 1996) ("An alleged agreement wherein the defendant's duty to pay is conditioned upon receipt of payment from its customer is clearly contradictory to the payment terms of 'net 30 days'after invoice. It is quite a stretch to assert that the alleged oral agreement merely explains or supplements the payment terms set forth in writing."). *See generally* Mygsa, S.A. de C.V. v. Howard Indus., Inc., 879 F. Supp. 624, 630 (S.D. Miss. 1995) ("Under [§ 75-2-202], parol evidence is not admissible to contradict the express terms of an agreement.").

[828] 696 F.2d 375 (5th Cir. 1983) (applying Mississippi law).

[829] *General Plumbing*, 696 F.2d at 377.

for General timely to complete its renovation subcontract. American prevailed in the trial court, owing largely, according to General, to the trial court's refusal to admit evidence of the oral agreement. The Mississippi Supreme Court upheld the trial court's ruling:

> General contends that this oral understanding constitutes a "course of dealing" or "usage of trade," which is admissible into evidence in order to "explain or supplement" the written contract, as an exception to the parol evidence rule, § 75-2-202(a). American counters that . . . . General's proposed testimony would impermissibly "contradict" the express term contained in the contract providing that any shipping date is a best estimate, that no guarantee of any shipping date is made, and that it would incur no liability for untimely shipment unless expressly stated otherwise in the agreement.
>
> We agree with American that the express terms and conditions contained in the written contract preclude the introduction of oral testimony regarding delivery dates. . . .
>
> Since no firm delivery date is specified in the contract, evidence of a promised six week delivery may arguably "supplement" rather than "contradict" contract terms. However, the only reason General urges introduction of a firm delivery date is to suggest that delivery after that date constitutes a breach of contract for non-timely delivery, by reason of which American is liable for incidental and consequential damages. The testimony is inadmissible under § 75-2-205 because its intended use flatly contradicts the unambiguous language of the contract that any date agreed upon by the parties is only a "best estimate" and that American would incur no obligation or liability from untimely delivery.[830]

As is true at common law,[831] the Code does not bar extrinsic evidence of collateral agreements[832] of subsequent agreements or modifications.[833] Nor does the Code bar extrinsic evidence in the absence of a writing[834] or when the writing against which the evidence is offered is unintegrated, in whole or in relevant part.[835] Likewise, the various "judge-made" ex-

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[830] *Id.* at 377-78. That said, the court also recognized that the written contract was silent as to price "because the contract contains no price terms, an oral agreement concerning price does not impermissibly 'contradict' this written contract, as would introduction of oral terms regarding delivery dates." *Id.* at 378 n.4.

[831] *See supra* subparts III.A.2.b & III.A.2.c and note 580 and accompanying text, respectively.

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[832] *Cf.* Security Mut. Fin. Corp. v. Willis, 439 So. 2d 1278, 1281-82 (Miss. 1983) (describing the rule that the written provisions adopted by the parties do not merge a separate contract, entered into to explain or supplement the existing contract, as "consistent" with Section 75-2-202).

[833] *See, e.g.*, Bell v. Hill Bros. Constr. Co., 419 So. 2d 575, 576-77 (Miss. 1982). *See generally* 1 HAWKLAND, *supra* note 821, § 2-202:2, at 2-176 to -177 & n.4; 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE: PRACTITIONER TREATISE SERIES § 2-10, at 88 & n.1 (4th ed. 1995).

[834] *See* 2 DEBORAH K. NELSON & JENNIFER L. HOWICZ, WILLISTON ON SALES § 13-27, at 90 (5th ed. 1995).

[835] Professor Hawkland explains:

> The parol evidence rule of Section 2-202 operates only with regard to "Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a *final expression* of their agreement with respect to such terms as are included therein . . . ."
>
> The concept of finality is an important limitation on the parol evidence rule, because it means that not all writings are protected by that rule. For example, there is no finality of agreement in a memorandum that is sent by one party to the other. The fact that the recipient does not reject it may deprive him of the protection of the statute of frauds under Section 2-201(3), but the failure to reject does not prevent the recipient showing that the terms of the contract are different from those stated in the memorandum, or, indeed, that no contract ever came into existence. This idea is reinforced by the language "confirmatory memoranda" found in Section 2-202, indicating that more than one memorandum is necessary to establish the kind of final written expression that is needed to make the parol evidence rule operate.
>
> Even where the parties have exchanged memoranda or have signed a written contract, it does not necessarily follow that the terms stated therein express their final agreement. A contract can be worked out in great detail with respect to some terms, while failing to address others in any way. In that case, it is possible to say that the contract is final as to one term but not as to another. Even where a term is defined precisely, there may be no finality as to certain aspects of it. For example, the parties may state the place and manner of delivery in great detail but not the time. The fact that the term is a final expression of their agreement as to place and manner, does not prevent the parties from showing by parol evidence what they had in mind as to the time the delivery was to be made. Similarly, the fact that they have made a

ceptions to the common law parol evidence rule,[836] also apply to contracts for the sale or lease of goods.[837]

In *Franklin v. Lovitt Equipment Co.*,[838] the Mississippi Supreme Court considered whether the exception to the common law parol evidence rule for extrinsic evidence of fraudulent inducement[839] applied in a case governed by section 2-202:

> Prior to enactment of the Uniform Commercial Code as a part of our statutory law, it was a well-established principle

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> final agreement on the price term, does not necessarily mean that they have made such an agreement on, for instance, the quantity term, though both may be discussed rather fully in the written contract itself. . . .
>
> . . . .
>
> The fact that the parties have reduced a term to writing is some evidence that it was intended as the authentication of their final agreement, but they have the competence to show otherwise. This competence is not destroyed by an integration or merger clause, because that clause cannot lift itself by its own bootstraps so as to be immune from contrary parol evidence that the parties did not intend integration. The merger clause is strong evidence that integration was intended, but it is not the sole evidence to be considered.

1 HAWKLAND, *supra* note 821, § 2-202:2, at 2-176 to -178 & -181 to -182 (footnotes omitted); *see also* 1 WHITE & SUMMERS, *supra* note 833, § 2-10, at 88 & n.3 (observing that the UCC parol evidence does not "exclude evidence that the parties did not intend the writing to be binding").

[836] *See supra* subpart III.B.

[837] *See* 1 WHITE & SUMMERS, *supra* note 833 § 2-12, at 104. For example,

> Section 2-202 has no application to a writing that was obtained or executed through fraud, duress, or mistake. These matters are sometimes said to constitute exceptions to the parol evidence rule, but they are assimilated under the "intended by the parties as a final expression of their agreement" language of Section 2-202. In other words, the parties are always competent to show under the section that they did not make a contract, and the parol evidence rule does not prevent them from making this showing. They are also competent to show that no contract was formed because of lack of consideration, even though the writing recites that a consideration was given, or that the contract has failed because oral conditions precedent to its existence have not been satisfied, notwithstanding the fact that the writing contains no recital of these conditions or, conversely, states that the obligation is absolute.

1 HAWKLAND, *supra* note 821, § 2-202:2, at 2-179 to -181 (footnotes omitted).

[838] 420 So. 2d 1370 (Miss. 1982).

[839] *See supra* subpart III.B.1.

> that where fraud was alleged with respect to the formation of a written contract, the parol evidence rule would not bar consideration of a contemporaneous oral agreement. Further, section 75-1-103 of the Mississippi Code Annotated (1972) explicitly provides that the common law principles of fraud and misrepresentation should supplement the commercial code provisions. On the basis of this background, our Court has continued to recognize the fraud exception to the parol evidence rule subsequent to the passage of section 75-2-202. Thus, we conclude that the chancellor was required to consider the testimony offered by Franklin and his friends.[840]

2. *Distinguishing Features*

Unlike common law, the terms of a written contract for the sale or lease of goods – even an integrated, unambiguous contract for the sale or lease of goods – may be supplemented by *non-contradictory* evidence[841] of course of dealing, usage of trade, course of performance,[842] or evidence of consistent addi-

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[840] *Franklin*, 420 So. 2d at 1372 (citations omitted).

[841] Professor Hawkland provides an interesting discussion of contradiction versus explanation or supplementation, *see* 1 HAWKLAND, *supra* note 821, § 2-202:3, at 2-187 to -196, as do Professors White and Summers, *see* 1 WHITE & SUMMERS, *supra* note 833, at 92-102.

[842] *See* MISS. CODE ANN. § 75-2-202(1) (1981). The Code also allows a court to admit such evidence to explain the terms of a writing, *see id.*, but that allowance is afforded by the common law as well, *see supra* subpart III.A.2.a.

Professor Hawkland argues that even contradictory evidence of course of performance is admissible under Section 2-202 because

> under Section 2-202, the final expression of written terms cannot be "contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." Course of performance involves neither a prior nor a contemporaneous agreement, and thus is beyond the proscription of the section.
>
> . . . . According to the comments to Section 2-208, course of performance is the best indication of what the contract means, and it is always admissible to show what that meaning is. This does not mean, of course, that it stands higher in the hierarchy of probative value than the express term itself. Indeed, the converse is true. That is a different matter, however. Course of performance is always admissible to show the meaning of a term. Where there is a difference in the meaning derived from the term itself and the course of performance, the court is directed by Section 2-208(2) to construe the two consistently, and that can usual-

tional terms.[843]

The Code dispenses with the presumption that a written contract is fully integrated,[844] as well as the requirement that

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> ly be accomplished by finding that the course of performance has resulted in a modification or waiver of the express term.
>
> In the rare case where neither modification nor waiver can be established, and no other reasonable way of reconciling course of performance with the express term is available, the express term controls. Even in this situation, however, course of performance is admissible, and it fails only when the court cannot reconcile it with the express term, a process that has no connection with the parol evidence rule.

1 HAWKLAND, *supra* note 821, § 2-202:3, at 2-196 to -197.

[843] *See* MISS. CODE ANN. § 75-2-202(2). However, if (but *only* if) the court finds the writing to be *fully* integrated, then evidence of consistent additional terms (and *only* evidence of consistent additional terms) is *not* admissible to explain or supplement the writing. *See id.* Furthermore,

> [t]his proviso is essentially what distinguishes Section 2-202(b) from Section 2-202(a). Under subsection (a), trade usage and course of performance may be admitted to explain or supplement a written contract even where the contract is found to be integrated in the sense of being a complete and exclusive statement of the terms of the agreement. This is because commercial documents are to be read on the assumption that the course of prior dealings between the parties and usage of trade were taken for granted when the document was written. Unless that assumption is negated expressly or by strong implication, these implied terms become elements of the contract itself. No such assumption is made with regard to other additional terms, and, therefore, they cannot be said to exist where the written contract is found to contain a complete and exclusive statement of terms.

1 HAWKLAND, *supra* note 821, § 2-202:4, at 2-197 to -199 (footnote omitted). *See generally id.* § 2-202:3, at 2-187 & n.3.

[844] *See* UNIFORM COMMERCIAL CODE § 2-202 cmt. 1(a) (1999). *See generally* 1 HAWKLAND, *supra* note 821, § 2-202:1, at 2-175 & n.5; 2 NELSON & HOWICZ, *supra* note 834, § 13-23, at 85 & n.71. *But cf.* 1 WHITE & SUMMERS, *supra* note 833, § 2-9, at 87-88 (observing that "[s]ome commentators and at least a few courts conclude that 2-202 abolishes any presumption that a writing apparently complete on its face is complete and exclusive," but then admitting uncertainty, as between White and Summers themselves, about how far section 2-202 erodes the presumption that "elaborate writings" are complete). In other words,

> [b]y asking whether the "writing [was] intended by the parties as a final expression of their agreement with respect to such terms as are included therein," the Code shifts the initial inquiry to the question of partial integration. A judge working through the parol evidence rule finds the question of total integration the last question, rather than the first, because it is found in the last clause of Section 2-202, which asks

a trial court must find that a written contract is ambiguous or less-than-fully integrated before the court may admit any evidence beyond the four corners of the writing, including but not limited to evidence of course of dealing, usage of trade, course of performance, or consistent additional terms.[845]

In the estimation of the Mississippi Supreme Court, the Code

> provides a more permissive approach for the admission of extrinsic evidence than that found in our general body of law. Specifically, § 75-2-202 does not require that the agreement in question first be found to be incomplete or ambiguous before evidence of course of dealing and usage of trade may be considered.

> whether the writing was "intended also as a complete and exclusive statement of the terms of the agreement."

WILLIAM H. HENNING & GEORGE I. WALLACH, THE LAW OF SALES UNDER THE UNIFORM COMMERCIAL CODE ¶ 3.05, at 3-32 to -33 (1992) (footnotes omitted) (quoting UNIFORM COMMERCIAL CODE § 2-202).

[845] *See* UNIFORM COMMERCIAL CODE § 2-202 cmt. 1(c); *see also* Southern Natural Gas Co. v. Pursue Energy, 781 F.2d 1079, 1081 n.3 (5th Cir. 1986) (observing that, under section 75-2-202, a court "may be able to consider course of dealing, usage of trade, and course of performance in determining whether the contract is ambiguous," but not reaching that issue in the case sub judice "because the parties d[id] not contend on appeal that course of dealing, usage of trade, or course of performance should be considered in determining whether the contract between Southern and Pursue is ambiguous"). *But see id.* at 1082 n.5 (citing Pfisterer v. Noble, 320 So. 2d 383 (Miss. 1975), a non-Code case, as authority for refusing to consider evidence beyond the four corners of the contract in determining whether the contract is ambiguous). *See generally* 1 HAWKLAND, *supra* note 821, § 2-202:1, at 2-175 & n.6; 2 NELSON & HOWICZ, *supra* note 834, § 13-23, at 85.

Section 2-202

> recognizes the value of certainty in commercial dealings by giving primacy to written terms, but it also acknowledges that the purpose of sales law is not only certainty of result, but the enforcement of the agreement of the parties.

1 HAWKLAND, *supra* note 821, § 2-202:1, at 2-174. In this way, Professor Hawkland argues, Section 2-202 forges a "compromise" between Professor Williston's view that the words or a written contract should be given their usual, objective meaning, notwithstanding the meaning the parties actually attributed to them, and Professor Corbin's view that the words or a written contract can only be understood in the context in which the agreement was formed. *See id.* at 2-172 to -174. However, the "compromise" seems to come out rather more in Professor Corbin's favor. *See id.* at 2-174 to -176 and authorities cited therein.

> Under our general, non-UCC, parol evidence rule, by contrast, a document must first be found to be incomplete or ambiguous before said document may be explained, but not contradicted, by extrinsic evidence[846]

a. Course of Dealing

A "course of dealing" is "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."[847] A course of dealing "give[s] particular meaning to and supplement[s] or qualif[ies] terms of an agreement"[848]—that is to say, a course of dealing may (1) explain or qualify the terms of the written agreement or (2) supplement or modify the terms of the written agreement.[849] The parties' course of dealing "may enter the agreement *either* by explicit provisions or the agreement *or* by tacit recognition" arising out of prior conduct.[850]

A prior single act cannot constitute a "course of dealing" as that term is defined in section 1-205,[851] nor can "the mere sending of terms back and forth . . . , without more."[852] Nor does the conduct of the parties after they have executed the written agreement constitute a course of dealing.[853] The parties' course of dealing "is restricted, literally, to a sequence of conduct between the parties previous to the agreement."[854]

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[846] J.O. Hooker & Sons v. Roberts Cabinet Co., 683 So. 2d 396, 400 (Miss. 1996); *accord* Yazoo Mfg. Co. v. Lowe's Cos., 976 F. Supp. 430, 433 (S.D. Miss. 1997). *See generally supra* notes 572-73 and accompanying text.

[847] MISS. CODE ANN. § 75-1-205(1) (1981) (emphasis added).

[848] *Id.* § 75-1-205(3).

[849] *See id. See generally* 1 HAWKLAND, *supra* note 821, § 1-205:1, at 1-245 to -246 & n.5. That is not to say, however, that a prior single act is not relevant at all to determining the intent of the parties to a written contract for the sale or lease of goods:

> Because of the requirement that course of dealing involve sequential, previous conduct, a single prior act of the parties can never become a course of dealing. A prior single act may, however, be some evidence of what the parties had in mind in the transaction presently at issue and should be admitted into evidence to prove that intent, unless it violates the parol evidence rule stated by Section 2-202. As a single act it is not entitled to control usage of trade in accordance with the hierarchy set forth in Section 1-205(4). In other words, while a course of dealing may show that the parties have their own special way of doing business that is at odds with usual trade practice, a single act cannot be used to establish that idiosyncratic behavior which one of the parties denies.

1 HAWKLAND, *supra* note 821, § 1-205:3, at 1-254 (footnotes omitted).

[850] UNIFORM COMMERCIAL CODE § 1-205 cmt. 3 (1999) (emphasis added).

[851] International Therapeutics, Inc. v. McGraw-Edison Co., 721 F.2d 488, 491

(5th Cir. 1983); *see also* Kern Oil & Ref. Co. v. Tenneco Oil Co., 792 F.2d 1380, 1385 (9th Cir. 1986) (applying analogous Texas law), *cert. denied*, 480 U.S. 906 (1987). *See generally* 1 WHITE & SUMMERS, *supra* note 833, § 3-3, at 114 and authorities cited therein.

[852] 1 WHITE & SUMMERS, *supra* note 833, § 3-3, at 114.

[853] *See* Mid-South Packers, Inc. v. Shoney's, Inc., 761 F.2d 1117, 1123 (5th Cir. 1985); Mygsa, S.A. de C.V. v. Howard Indus., Inc., 879 F. Supp. 624, 630 n.8 (S.D. Miss. 1995) (both emphasizing that "course of dealing" deals with conduct between the parties *prior* to the transaction at hand). The conduct of the parties after the written agreement is more properly termed their "course of performance." *See infra* subpart III.D.2.c. *See generally* 1 WHITE & SUMMERS, *supra* note 833, § 3-3, at 115 & n.5.

[854] UNIFORM COMMERCIAL CODE § 1-205 cmt. 2. Courts *may* consider prior dealings between the party against whom the course of dealing is offered and third parties; but, a court asked to do so should exercise caution:

> If the evidence proffered relates to dealings with a third party, rather than to prior dealings between the litigating parties, courts have noted that "[s]ubsidiary evidence of parallelism must be strong and convincing . . . [and] standards of admissibility should be higher than when dealing with transactions between the same parties."

H&W Indus., Inc. v. Occidental Chem. Corp., 911 F.2d 1118, 1122 (5th Cir. 1990) (applying Mississippi law) (quoting Cibro Petroleum Prods., Inc. v. Sohio Alaska Petroleum Co., 602 F. Supp. 1520, 1551 (N.D.N.Y. 1985), *aff'd*, 798 F.2d 1421 (Emer. Ct. App.), *cert. denied*, 479 U.S. 979 (1986)).

In *Carlo Corp. v. Casino Magic of La. Corp.*, 26 F. Supp. 2d 904 (S.D. Miss. 1998), the court rejected an argument by the thwarted seller of a vessel (Casino Magic) that the would-be buyer (Carlo) was required by its "past course of conduct" to give the seller a "reasonable basis" for refusing to consummate the sale:

> [T]he language and terminology centered upon the understanding by both parties that if Carlo accepted the vessel, it did so according to the following limitations set forth at page 3 of the Agreement:
>
> > Seller shall deliver the Vessel to Buyer "as is and where is". Except with regard to title, Seller makes NO WARRANTY of any kind whatsoever, whether expressed or implied, including without limitation, any implied warranty of merchantability, quality, condition, fitness for any particular purpose, seaworthiness, or against any redhibitory vices or defects, hidden, latent or otherwise, all such warranties being expressly WAIVED by Buyer.
>
> It is this Court's opinion that [this] Condition Precedent . . . , is

A sequence of conduct does not require a sequence of contracts. "A pattern for purposes of course of dealing . . . may be established under a single contract presenting repeated occasions for tender and rejection."[855]

The probative value of the parties' prior course of dealing is a function of the similarities between the prior transaction(s) and the one before the court:

> Section 1-205(1) provides that course of dealing is restricted to the parties' activity "which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." This reservation does not mean that the current transaction must be identical to previous ones but that it must be sufficiently analogous to make probable a finding that the parties intended to give

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> clearly in the nature of caveat emptor; with the drafter's express intent that the burden was upon the buyer, should it accept the vessel "as is," to perform such inspections as it deemed necessary to justify its decision. Such language clearly anticipates and prepares to defend against any subsequent claim by the buyer, after acceptance, that it was prohibited from inspecting the merchandise.
>
> What was intended as a shield against liability, at the outset, is now being employed as a sword to force a prospective buyer to pay a penalty for electing to withdraw.
>
> Carlo's reasons for electing to not take the vessel "as is" . . . are now being challenged as not the reasons that Casino Magic would have accepted; however, no where within the four corners of the Agreement is it stated or implied what the parties agreed would be acceptable reasons. . . . The Court does not find that the terms, when construed within the context of the Agreement as a whole, are ambiguous . . . .
>
> Curiously, Casino Magic asserts in the alternative that "the evidence concerning Carlo's past course of conduct supports Casino Magic's interpretation requiring that Carlo provide a reasonable basis for refusing to accept the Vessel 'as is.'" . . .
>
> As to "course of conduct" or "course of dealing," [Casino Magic] apparently concedes that this term, under the UCC, requires previous conduct between the parties. Casino Magic, however, argues that as Mr. Paulson [Carlo's apparent alter ego], in an unrelated transaction, employed different language to allow him to reject a vessel, he should have placed the same or similar language in the subject Agreement. The Court rejects this "back door" approach . . . . [This] Agreement was not drafted by Mr. Paulson, but by Casino Magic.

Id. at 908.

[855] 1 HAWKLAND, *supra* note 821, § 1-205:3, at 1-255.

> their present contract the same meaning they had assigned to their previous deals through their conduct. Similarity of contracts is not the only test in determining this probability. The determination must also take into account changes in conditions and any other factors that affect the probable validity of the analogy.[856]

Whether the prior course of dealing is sufficiently similar to be deemed to have informed the parties' agreement is an issue for the trier of fact.[857]

In *Mid-South Packers, Inc. v. Shoney's, Inc.*,[858] the Fifth Circuit considered whether the parties' prior course of dealing created a reasonable expectation that an invoice, containing terms additional to those orally agreed to by the parties, would be sent by the seller (Mid-South), in response to the buyer's (Shoney's) purchase order; and, therefore, whether the additional terms contained within the invoice became part of the parties' agreement under section 2-207.[859] The court explained that

> [s]ection 75-2-207 applies to the situation in which an agreement has been previously reached either orally or by informal writings, and one or both parties send written confirmation of

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[856] *Id.* at 1-256 to -257 (footnotes omitted).

[857] *See id.* at 1-257 & n.8.

[858] 761 F.2d 1117 (5th Cir. 1985) (applying Mississippi law).

[859] Section 2-207, addressing the so-called "Battle of the Forms," provides in relevant part:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
> (b) they materially alter it; or
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

MISS. CODE ANN. § 75-2-207(1)-(2) (1981).

> terms discussed, adding certain terms not discussed. The written confirmation is recognized primarily as a writing necessary to satisfy the statute of frauds when the agreement reached is at least partially unenforceable for lack of a writing; this appears to be the primary basis for permitting a written confirmation to act as an acceptance under § 75-2-207(1). We think this rationale properly applies to contracts that are partially oral, *i.e.*, the offer is oral and the acceptance written, so long as the written acceptance does not purport to contain the entire agreement.
>
> Here, Mid-South's August 12 offer to sell was orally made. Thus, the contract, concluded by Shoney's purchase orders, was initially unenforceable against Mid-South because not evidenced by a writing signed by Mid-South. Mid-South's invoice rendered the contract enforceable against it under the statute of frauds. By the same token, the extensive course of dealing between the two parties clearly indicated to Shoney's that the invoices would follow its purchase orders and, Shoney's having received several of the invoices in prior transactions, the interest and collection costs terms came as no surprise to Shoney's. Moreover, Shoney's purchase orders did not purport to contain all of the terms of the agreement and Mid-South's invoice, sent only one day following shipment, added a certainty and definiteness to the contract's terms that both parties expected and, presumably, desired. Finally, Shoney's had the right and the opportunity to prevent, in the usual way, the proposed terms from becoming part of the contract. . . .
>
> To be sure, courts have expressed some doubt, in contexts different from that presented here, whether a writing sent subsequent to the closing of the bargain may operate as an acceptance under § 2-207(1). However, under the circumstances of this transaction, and for the reasons stated, we think Mid-South's invoices constituted "written confirmations" within that section.[860]

In *Southern Cotton Oil Co. v. Merchants National Bank*,[861] the issue for the Fifth Circuit was whether a course of dealing between a bank (Merchants) and its customer (Southern) could establish whether the bank made presentment and notice of dishonor within a "reasonable" time under section 4-202.[862] The court held that Merchants had, based on its prior dealings with Southern, acted with a "reasonable" time despite delaying notice of dishonor for fifty-two days:

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[860] *Mid-South Packers*, 761 F.2d at 1123 (footnotes and citations omitted).

[861] 670 F.2d 548 (5th Cir. 1982) (applying Mississippi law).

> A course of dealing may establish the seasonableness of an action. A course of dealing had been established between the Bank and Southern prior to the present controversy. In seven prior transactions, delays from 9 to 45 days had been experienced. In three similar transactions involving drafts drawn by Southern on another customer, the payments were each delayed by 48 days. This history of slow payment was acceptable until, of course, a buyer became bankrupt in the interim. In light of this established course of dealing, we are in agreement with the District Court's implied finding that the Bank acted seasonably in delaying notice of dishonor for 52 days.[863]

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[862] Section 4-202 provides, in relevant part:

> (b) A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. Liability is limited to actual damages proved and may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.
> (c) A payor bank's determination of the customer's account balance on which a decision to dishonor for insufficiency of available funds is based may be made at any time between the time the item is received by the payor bank and the time that the payor bank returns the item or gives notice in lieu of return, and no more than one determination need be made. If, at the election of the payor bank, a subsequent balance determination is made for the purpose of reevaluating the bank's decision to dishonor the item, the account balance at that time is determinative of whether a dishonor for insufficiency of available funds is wrongful.

MISS. CODE ANN. § 75-4-202 (Supp. 1998). "Reasonable time" for taking any action "depends on the nature, purpose and circumstances of such action." MISS. CODE ANN. § 75-1-204(2) (1981).

[863] *Southern Cotton Oil*, 670 F.2d at 550.

b. Usage of Trade

A "usage of trade" is a "practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."[864] To establish "regularity of observance," the proffering party "must demonstrate a dominant pattern of use within the industry."[865]

The language of any commercial contract "is to be interpreted as meaning what it may be fairly expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade."[866] An absurd or unreasonable meaning will not suffice.[867]

Usages of trade "furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding."[868] To

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[864] MISS. CODE ANN. § 75-1-205(2) (1981). *See generally* 1 WHITE & SUMMERS, *supra* note 833, § 2-10, at 101 & n.54 and cases cited therein. "When a trade usage is widespread, there is a presumption that the parties intended its incorporation, unless the contract language carefully negates it." *Id.* at 101.

[865] H&W Indus., Inc. v. Occidental Chem. Corp., 911 F.2d 1118, 1122 (5th Cir. 1990) (applying Mississippi law). Thus, for example, "[t]he testimony of one officer as to that company's practices is generally insufficient to establish such a pattern." *Id.* (citing First Flight Assocs., Inc. v. Professional Golf Co., 527 F.2d 931 (6th Cir. 1975), Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970), and Magnolia Lumber Corp. v. Czerwiec Lumber Co., 43 So. 2d 204 (Miss. 1949)).

[866] UNIFORM COMMERCIAL CODE § 1-205 cmt. 4 (1999).

[867] *See* Yazoo Mfg. Co. v. Lowe's Cos., 976 F. Supp. 430, 436 (S.D. Miss. 1997) ("[D]efendant has not produced any evidence that its definition of 'committed to take' is embodied in any written trade code or similar writing. Defendant would simply have the court take its word on the subject and ask the trier of fact to accept that the words used actually mean the opposite of what they say. This court is persuaded otherwise, and holds that a trier of fact would find that to construe the phrase 'committed to take' to mean 'forecast' leads to an impractical and absurd result. The words 'committed to take' mean what they say and clearly connote Lowe's promise to purchase the lawn mowers at issue.").

[868] UNIFORM COMMERCIAL CODE § 1-205 cmt. 4. The Mississippi Supreme Court staated that

> any competent evidence of trade usage should have been admitted to clarify, hopefully, the complex and somewhat ambiguous language used by the commission in the technical documents constituting the contract

be recognized as such, a trade usage need not be "'ancient or immemorial,' 'universal,' or the like."[869] Rather, Section 1-

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at issue.

> Dixie correctly states an abstract rule of law requiring that ambiguities in a written contract be resolved unfavorably to the party who drafted the contract. However, this rule may not be enlarged, as it seems to have been done, to exclude the drafting party's evidence aimed at clearing the ambiguity by showing reasonable commercial understandings, concerning the meanings of technical terms, arising from usage of trade . . . .

Mississippi State Hwy. Comm'n v. Dixie Contractors, Inc., 375 So. 2d 1202, 1205-06 (Miss. 1979) (citations omitted).

[869] UNIFORM COMMERCIAL CODE § 1-205 cmt. 5. In this way, Section 1-205 displaces the *ancien regime* of "custom." *See* 1 HAWKLAND, *supra* note 821, § 1-205:4, at 1-257. That said, Professor Hawkland advises:

> Although displaced, common law custom provides a good vantage point from which to view usage of trade. To be effective common law custom had to be: "(1) legal; (2) notorious; (3) ancient or immemorial and continuous; (4) reasonable; (5) certain; and (6) universal and obligatory." Several of these requirements are continued in modified form as aspects of trade usage under the Code.
>
> The requirement that custom be "legal" undoubtedly carries over to the UCC. A usage of trade involving illegal activities may form a part of the parties' agreement but is unenforceable and, accordingly, does not form a real part of the contract. The requirement that custom be "notorious" means, in effect, that it is binding only upon those who know of it. Section 1-205(2) modifies this requirement and is reinforced through the rule announced in Section 1-205(3) that usage of trade binds all members of that trade and, additionally, binds others who are, or should be, aware of it. If both the seller and the buyer are in the sugar business, a trade usage among sugar merchants would bind them, even if they are ignorant of it. On the other hand, if the seller is a sugar merchant but the buyer is not, the trade usage would not become an implied term of their contract, unless the buyer actually knew of it or should have known of it.
>
> The fact that Section 1-205 seems to have rejected outright the requirements that custom be immemorial or ancient does not create "instant" trade usage, because subsection 1-205(2) defines "usage of trade" as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." . . .
>
> The Code seems to continue the quality of reasonableness required by custom. Official Comment 5 states that trade usage includes "usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not readily agree." This language suggests, as would be expected, that neither unreasonable nor unethical

205(b) encompasses any usage "currently observed by the great majority of decent dealers, even though dissidents ready to cut

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kinds of usage may qualify as trade usage. Official Comment 6 discusses the matter more explicitly:

> The policy of this Act controlling explicit unconscionable contracts and clauses (Sections 1-203, 2-302) applies to implicit clauses which rest on usage of trade and carries forward the policy underlying the ancient requirement that a custom or usage must be "reasonable." However, the emphasis is shifted. The very fact of commercial acceptance makes out a prima facie case that the usage is reasonable, and the burden is no longer on the usage to establish itself as being reasonable. But the anciently established policing of usage by the courts is continued to the extent necessary to cope with the situation arising if an unconscionable or dishonest practice should become standard.

The requirement that custom be certain meant that widespread variation from a "customary norm" could prevent its efficacy. If, for example, allowing late deliveries was usual in a particular trade but the tardiness varied from two days with respect to some merchants to 10 days with respect to others, no custom existed. Official Comment 9 indicates that the Code rejects this view and states in part that

> [i]n cases of a well established line of usage varying from the general rules of this Act where the precise amount of the variation has not been worked out into a single standard, the party in relying on the usage is entitled, in any event, to the minimum variation demonstrated. The whole is not to be disregarded because no particular line of detail has been established.

For the late deliveries example Official Comment 9 requires that the seller be given two days of tolerance.

The requirement that custom be universal to be effective meant that almost all persons who were supposed to adhere to the custom did, in fact, observe it. Although mere majority compliance was insufficient to establish custom, some noncompliance was allowed, because perfect compliance was an obvious impossibility. The Code changes this requirement for its concept of trade usage but only in matter of degree. While Section 1-205(2) provides that trade usage comes into existence when "regularity of observance" causes people to rely on it, not everyone need observe the practice involved, as Official Comment 5 states that full recognition is "available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree. There is room also for proper recognition of usage agreed upon by merchants in trade codes." "Great majority," as used in this comment, probably means something less than what "universality" meant at common law so that a trade code may rise to the level of trade usage, although a slim plurality of the affected merchants adopt it.

Id. at 1-257 to -261 (footnotes omitted).

corners do not agree."[870] Both parties need not be "consciously aware" of the usage for the court to consider it;[871] rather, "[i]t is enough if the trade usage is such as to 'justify an expectation' of its observance."[872]

A court should consider any usage of trade in the vocation or trade in which the parties are engaged;[873] in the place where any performance is to occur;[874] or of which the parties are or should be aware.[875]

The party asserting a trade usage must prove its existence and its applicability to the other party.[876] The existence and scope of trade usage by which the terms of a written contract for the sale or lease of goods may be explained are fact questions.[877]

c. *Course of Performance*

> The meaning of words is not as clear as many suppose. Justice Holmes once observed that "you cannot prove a mere private convention between two parties to give language a different meaning from its common one. It would open too great risks if evidence were admissible to show that when they said five hundred feet they agreed it should mean one hundred inches, or that Bunker Hill Monument should signify Old South Church." If the parties through repeated performances, however, indicate that they regard "five hundred feet" as meaning "one hundred inches" or that "Bunker Hill Monument" means "Old South Church" this evidence of course of performance should be admitted, and probably relied

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[870] UNIFORM COMMERCIAL CODE § 1-205 cmt. 5.

[871] 1 WHITE & SUMMERS, *supra* note 833, § 3-3, at 114. Indeed, "a party can be chargeable with a usage of trade of which it is ignorant." *Id.* at 115.

[872] *Id.* at 114 (quoting the analog of MISS. CODE ANN. § 75-1-205(2)).

[873] MISS. CODE ANN. § 75-1-205(3) (1981).

[874] *Id.* § 75-1-205(5).

[875] *Id.* § 75-1-205(3). *See generally* 1 WHITE & SUMMERS, *supra* note 833, § 3-3, at 114 & n.4.

[876] 1 HAWKLAND, *supra* note 821, § 1-205:4, at 1-261.

[877] MISS. CODE ANN. § 75-1-205(2) ("The existence and scope of such a usage are to be proved as facts."). *See generally* 1 HAWKLAND, *supra* note 821, § 1-205:4, at 1-261 & n.14.

on.[878]

A "course of performance" is a sequence of previous occasions to tender or to perform under the contract in dispute, provided that on all such occasions, the non-tendering or non-performing party was aware of the tender or performance, had an opportunity to object to it, and did not object in a timely manner, if at all.[879] A single act or omission does not constitute a course of performance.[880] Rather, a course of perfor-

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[878] 1 HAWKLAND, *supra* note 821, § 2-208:3, at 2-305 (quoting Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 420 (1899)).

[879] The Mississippi Uniform Commercial Code provides that:

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection *shall* be relevant to determine the meaning of the agreement.

MISS. CODE ANN. § 75-2-208(1) (1981) (emphasis added). Section 2A-207 sets forth the analogous provision regarding lease contracts. MISS. CODE ANN. § 75-2A-207(1) (Supp. 1998).

Course of performance, under the Code, is similar to, but distinct from the common law doctrine of "practical construction," discussed *supra* subpart II.C.8. *See* 1 WHITE & SUMMERS, *supra* note 833, § 1-6, at 48 (discussing both the similarities and the differences between course of performance and practical construction). Professor Hawkland sees far more similarity than difference:

> "Course of performance" is new language for an old idea called "practical construction." For more than a century, United States courts have recognized that the actual performance of a contract by the parties had high probative value in determining its actual meaning, particularly when its express terms were vague, missing or ambiguous. . . . Section 2-208 extends this approach by making course of performance relevant to determine the meaning of the contract, even where the meaning of its express terms seems clear on their face.

1 HAWKLAND, *supra* note 821, § 2-208:1, at 2-299 (footnote omitted).

[880] *See* UNIFORM COMMERCIAL CODE § 2-208 cmt. 4 (1999). *See generally* 1 HAWKLAND, *supra* note 821, § 2-208:2, at 2-301 & n.3; 1 WHITE & SUMMERS, *supra* note 833, § 1-6, at 48. In other words,

> [a]lthough a single occasion of performance does not amount to a "course of performance," where it is tendered and accepted under a contract to be performed in stages, there is a waiver of the express term as to that occasion of performance. Depending on the circumstances, it also might constitute the kind of conduct that would impose upon the other party the duty to notify the variant performer that subsequent stages must be

mance deals with a contract which provides for several "occasions for performance."[881]

Unilateral acts or omissions, undertaken without the knowledge or consent of the other party to the contract, cannot rise to the level of course of performance.[882]

The parties' course of performance of a particular contract is always relevant to determine the meaning of their written agreement.[883] The parties' course of performance may also

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> performed in accordance with the express contract terms. This notification need not be given in any formal way, and may be accomplished in most cases by a grumbling acceptance of the defective tender. The whole idea, of course, is not to lull a party into thinking that strict performance is not required so that he is surprised by a rejection of a subsequent tender which he had some reason to think would be acceptable.

1 HAWKLAND, *supra* note 821, § 2-208:3, at 2-310.

[881] *See* MISS. CODE ANN. § 75-2-208(1); *see also* Mygsa, S.A. de C.V. v. Howard Indus., Inc., 879 F. Supp. 624, 630 n.8 (S.D. Miss. 1995). *See generally* 1 WHITE & SUMMERS, *supra* note 833, § 1-6, at 48. Furthermore,

> [t]he words "repeated occasions" suggest [a] contract that is to be performed in several stages, but only two occasions of conduct are needed to trigger the operation of the section. Obviously, the greater the number of performances that are made and accepted, the greater will be the probative value of the course of performance in establishing the meaning of the contract. Moreover, the relationship is not necessarily a direct one, because three successive performances of an installment contract, given by one party and accepted by the other, may be worth proportionally more than two successive performances by the same parties as an aid in determining their actual agreement.

1 HAWKLAND, *supra* note 821, § 2-208:2, at 2-301 to -302 (footnote omitted).

[882] *See* 1 HAWKLAND, *supra* note 821, § 2-208:2, at 2-302. Before invoking Section 2-208, the party seeking to invoke it must show

> that an occasion of performance was accomplished under circumstances in which the other party had knowledge of its nature and the opportunity to object to it. Hence, a sudden, unilateral act of performance thrust upon the other party cannot be considered a "course of performance," though it may be incumbent upon the other party to object to it after it is made, lest he mislead the first actor into thinking that the performance was satisfactory and a proper basis for accomplishing latter stages of the contract. Conversely, if the other party does object to performance in a timely manner, given the circumstances of the situation, the performance, whether proffered or accomplished, thereafter can form no part of a course of performance.

Id. (footnote omitted).

[883] *See* UNIFORM COMMERCIAL CODE § 2-208 cmt. 2; *see, e.g.*, Mississippi State

modify or waive the express terms of the written agreement,[884] notwithstanding the hierarchical preference for express terms over course of performance and other terms implied by the Code,[885] as long as it does not run afoul of one or both of the provisions in Section 2-209 that (1) any subsequent modifications must be in writing, if the parties include such a requirement in their written contract,[886] and (2) the modified agreement must satisfy the statute of frauds.[887]

Hwy. Comm'n v. Dixie Contractors, Inc., 375 So. 2d 1202, 1205 (Miss. 1979) ("A course of performance under the first segment, depicted in plan sheet 2-E, could be a material aid in construing the performance to be required under identical pay items on the 11.4-mile segment depicted in the plan sheet."). *See generally* 1 WHITE & SUMMERS, *supra* note 841, § 1-6, at 47-48.

[884] *See* MISS. CODE ANN. § 75-2-208(3) ("[C]ourse of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance."). *See generally* 1 WHITE & SUMMERS, *supra* note 833, § 1-6, at 47 ("[I]f, in light of a 'relevant' course of performance, either a waiver or a modification . . . is thus shown, courts sometimes say that course of performance 'controls' and thus alters the express term.").

[885] *See* MISS. CODE ANN. § 75-2-208(2); *infra* notes 911-14 and accompanying text. Furthermore, a

> course of performance is relevant under section 2-208(1) to determine the "meaning of the agreement" in the first place. When the section is so used, the apparent inconsistency between an express term and course of performance can melt away. After all, the very theory of course of performance, according to Comment 1, is that "[t]he parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was." When course of performance thus "controls," despite a seemingly inconsistent express term, the express term is not modified or waived. . . .

1 WHITE & SUMMERS, *supra* note 833, § 1-6, at 47-48 (quoting UNIFORM COMMERCIAL CODE § 2-208 cmt. 1).

[886] *See* MISS. CODE ANN. § 75-2-209(2) (1981).

[887] *See* MISS. CODE ANN. § 75-2-209(3).

However, Professor Hawkland emphasizes that, even if the course of performance does run afoul of either Section 2-209(2) or (3), and is, therefore, not a valid modification, the course of performance is still relevant evidence of the parties' construction and interpretation of the (unmodified) written agreement:

> The parties are always competent to perform their contract differently from the manner contemplated by its express terms, and their actual performance will always be relevant and admissible to show their actual agreement. At minimum, this actual performance will show a waiver of the express term for the particular stage of performance; at maximum it

Unlike a usage of trade, with which a party may be deemed to have knowledge despite the parties' actual ignorance of the usage,[888] the party against whom a course of performance is offered to modify, waive, or supplement the express terms of the written agreement must have had "knowledge of the nature" of the other party's non-conforming performance, or non-performance, and the opportunity to object to that (non)performance,[889] and must have either accepted or acquiesced in the other party's act or omission or failed to object in a timely manner.[890] Unlike course of dealing and trade usage, course of performance may not be "carefully negated" by the terms of the written agreement in order to proscribe its use in the event of a dispute over the contract's meaning and construction.[891]

d. Consistent Additional Terms

> [C]onsistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.[892]

> may show that the express term has been modified and replaced by a new term indicated by the course of performance.

1 HAWKLAND, *supra* note 821, § 2-208:2, at 2-306.

[888] *See supra* note 871.

[889] MISS. CODE ANN. § 75-2-208(1).

[890] *See id. See generally* 1 WHITE & SUMMERS, *supra* note 833, § 1-6, at 48, and authorities cited therein.

[891] *See* 1 HAWKLAND, *supra* note 821, § 2-208:3, at 2-306 (observing that Comment 2 to Section 2-202, while counseling that course of dealing and usage of trade may be superseded if the writing carefully negates them, makes no such provision for carefully negating course of performance "because course of performance necessarily involves activities that occur after the contract is made").

[892] UNIFORM COMMERCIAL CODE § 2-202 cmt. 3 (1999); *see also* Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 656-57 (Miss. 1975) ("We ascertain the legislative intent from [§ 75-2-202] to be that parol evidence may not be used to contradict the terms of confirmatory memoranda of a written agreement intended as the final expression of a contract, but that it might be explained or supplemented

The party proffering evidence of a consistent additional term, under Section 2-202(2), must satisfy the court that (1) the proffered term is "consistent" with the terms contained in the writing and (2) the writing is not fully integrated, thereby proscribing additional terms, consistent or otherwise. As Professor Hawkland explains:

> [B]efore evidence of a consistent additional term becomes inadmissible, both parties must have intended the writing to "be a complete and exclusive statement of all the terms." Merger and other terms in a form contract, or those inserted unilaterally into a negotiated contract, and not carefully considered by both parties, may be found not to reflect the actual agreement of the parties, particularly where they thrust in a different direction from the dickered terms. Evidence explaining or supplementing these unbargained-for terms will normally be found to be consistent and thus admissible, because the circumstances will probably show that the parties did not intend the written term in question to reflect their complete and exclusive statement of the agreement. This point, however, cannot be carried too far, lest the stability of contractual undertakings be unduly threatened. To become admissible, evidence of additional terms must overcome two hurdles. Such terms are inadmissible unless the court answers two questions in the negative: (1) Did the parties actually intend the writing to represent their entire agreement? (2) If not, is the

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by evidence of consistent additional terms unless there be an adjudication the writing was intended as an exclusive statement of the agreement.").

Section 216 of the *Restatement (Second)* takes a similar position as the UCC, but in some ways goes further from the Code toward allowing evidence of consistent additional terms:

> (1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.
>
> (2) An agreement *is not* completely integrated if the writing omits a consistent additional agreed term which is
>
> (a) agreed to for separate consideration, or
>
> (b) such a term as in the circumstances might naturally be omitted from the writing.

RESTATEMENT (SECOND) OF CONTRACTS § 216 (1981) (emphasis added).

> proffered additional term of such a kind and nature that it certainly would have been included in the written contract had the parties, in fact, agreed upon it?[893]

In *Noble v. Logan-Dees Chevrolet-Buick, Inc.*,[894] the written contract between the parties recited, *inter alia*, the total consideration ($6,615) to be paid by the buyer (Noble) – consisting of a cash down payment, trade-in allowance, and $2,150 payable on delivery – and that "The front and back of this order comprises the entire agreement pertaining to this purchase and no other agreement of any kind, verbal understanding or promise whatsoever, will be recognized."[895] The seller (Logan-Dees) offered trial testimony that, in addition to the $2,150 payable at delivery, Noble had verbally agreed to transfer to Logan-Dees an insurance check in the amount of $1,532.66, pertaining to the vehicle Noble was trading in.[896] The trial court admitted the evidence and entered a judgment ordering Noble to pay the proceeds of the insurance check to Logan-Dees. On appeal, the Mississippi Supreme Court reversed and rendered judgment for Noble:

> Noble contends that under the provisions of MISS. CODE ANN. § 75-2-202 (1972) the court erred by permitting parol testimony contradicting the terms of the agreement of the parties as expressed in the contract. Logan-Dees contends that it was entitled to offer parol testimony under subsections (a) and (b) of the statute.

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[893] 1 HAWKLAND, *supra* note 821, § 2-202:4, at 2-201 to -203 (footnotes omitted). Furthermore,

> [i]n answering these questions, . . . the court is entitled to listen to all the evidence out of the hearing of the jury. . . . [T]he test . . . centers on the actual, subjective intent of the parties, and the "certainly-would-have-been-included" standard becomes one of credibility rather than an exclusionary force in and of itself . . . . But the standard seems to be something more than a mere indication that certain facts are to be scrutinized for credibility; it is, itself, a test of credibility.

Id. at 2-203.

[894] 293 So. 2d 14 (Miss. 1974).

[895] *Noble*, 293 So. 2d at 15.

[896] *See id.* at 14-15.

> We hold that, under the facts as disclosed by the record, Logan-Dees was not entitled to offer parol testimony under subsection (a) because the evidence does not disclose a course of dealing and usage of trade as defined in MISS. CODE ANN. § 75-1-205, neither does it disclose a course of performance as defined by MISS. CODE ANN. § 75-2-208 (1972).
>
> We hold that Logan-Dees was not entitled to introduce parol testimony under subsection (b) because the evidence offered was not of consistent additional terms, but the evidence offered would show a different consideration from that expressed in the writing. We also hold that parol evidence was not admissible under subsection (b) because the contract, by its own terms, was a complete and exclusive statement of the terms of the agreement of the parties.
>
> If Logan-Dees expected to receive the proceeds of the insurance check as part of the consideration for the car sold to Noble, it would have been a very simple matter to include such a provision in the contract. Where parties, without any fraud or mistake, have deliberately put their contract in writing, the writing is not only the best, but the only, evidence of their agreement.[897]

Where a written agreement is not the final and complete expression of the parties' agreement, Mississippi courts have permitted extrinsic evidence of additional consistent terms.[898]

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[897] *Id.* at 15.

[898] *Compare, e.g.*, Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 657 (Miss. 1975) (holding that testimony regarding oral agreement which purportedly explained or supplemented written agreement was admissible because the written agreement provided that it was "as per our conversation"), *with* Ralston Purina Co. v. Rooker, 346 So. 2d 901, 902 (Miss. 1977) (distinguishing *Paymaster Oil Mill*, on the ground that the written agreement sub judice did not contain any language to the effect of the "as per our conversation" language in *Paymaster Oil Mill*, and concluding, therefore, that "the terms of the written contract were intended as the exclusive statement of the agreement between the parties" and that the proffered parol evidence that the parties understood that the defendant would only provide the plaintiff with the "soybeans produced from a particular farm, up to 4,500 bushels, [wa]s inconsistent with the contract provisions for buying and selling 4,500 bushels of soybeans" without regard to their source).

e. *Terms Implied by the UCC (a.k.a. "Gap-Fillers")*

Article 2 provides a number of "default" or "gap-filler" terms to which a court may resort if the written agreement of the parties is silent on a subject or if the express term(s) proffered by the parties create(s) a conflict or ambiguity that cannot be resolved by referring to course of performance, course of dealing, usages of trade, or consistent additional terms.[899] A court is often unable to resolve an ambiguity or conflict without resort to one or more "gap-filler"

> when the parties have omitted a term through inadvertence or ignorance, because in that situation they have made no agreement on the matter, either express or implied. In setting forth a number of statutory terms to be used to fill some of these gaps, the Code supplies the commonly accepted term on the matter and perhaps prevents the contract from failing for lack of a reasonable basis for enforcement.[900]

3. *Applying the UCC Parol Evidence Rules*

Subject to the free admissibility of non-contradictory evidence of trade usages, course of dealing, and course of performance,[901] the admissibility of any other evidence extrinsic to a writing governed by the Code depends, at least in part, on the familiar issues of integration and ambiguity.

a. *Questions of Integration*

When may a judge invoke the applicable Code parol evidence rule to exclude evidence extrinsic to the terms of an unambiguous writing:

> First, the judge may exclude the evidence on finding that the parties intended the writing to be a complete and exclusive statement of the terms of the agreement (unless it be evidence of course of dealing, usage of trade, or course of

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[899] *See, e.g.*, MISS. CODE ANN. §§ 75-2-305, 75-2-307, 75-2-308, 75-2-309(1)-(2), 75-2-310 & 75-2-311 (1981).

[900] 1 HAWKLAND, *supra* note 821, § 1-205:2, at 1-251.

[901] *See supra* subpart III.D.2.

> performance introduced only to explain or supplement the writing). . . . Second, the judge may exclude evidence extrinsic to terms set forth in the writing if he or she decides that the writing is a final written expression as to these terms and that the other evidence contradicts these terms. . . . Third, in passing on any parol evidence rule objection, the judge may decided that the proffered evidence of terms extrinsic to the writing is not credible, and he or she may exclude it on that ground alone. Section 2-202 is silent on this, but Professor McCormick thought that the "real service" of the parol evidence rule was here.[902]

Conversely, when may a judge admit extrinsic evidence notwithstanding the existing of an unambiguous writing:

> A court may decide that the writing is not a "final written expression" as to any terms and admit the evidence. A court may decide that the writing is a final written expression of some terms, but not a "complete and exclusive" statement of all terms, and admit evidence of "consistent additional terms" [unless he or she also determines that the alleged extrinsic term, if agreed upon would certainly have been included in the writing]. A court may decide that the writing is a final written expression as to terms and also that the writing is a "complete and exclusive statement," yet admit evidence of course of dealing, usage of trade, or course of performance to "explain" the meaning of the terms in the writing.[903]

The questions of whether a writing is integrated, or "complete," and, if so, whether it is fully integrated, or "exclusive," are questions of law for the trial judge to decide outside the presence of the jury[904]:

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[902] 1 WHITE & SUMMERS, *supra* note 833, § 2-9, at 86-87 (footnotes omitted).

[903] 1 WHITE & SUMMERS, *supra* note 833, § 2-12, at 104; *see also id.* § 2-10, at 91; 2 NELSON & HOWICZ, *supra* note 834, § 13-24, at 86 (observing that, if there is "any doubt" whether the parties intended their writing to be "the exclusive statement" of their agreement, "then parol evidence should be admitted, at least on the matter of consistent additional terms, to aid the court in giving full effect to the meaning of the contract").

[904] *See* MISS. CODE ANN. § 75-2-202(2) (1981); UNIFORM COMMERCIAL CODE § 2-

> The language of 2-202 does not expressly set forth "tests" by which the judge is to determine whether the writing is a complete and exclusive statement of the terms of the contract. Over the years, courts have devised different tests. One of these is the so-called "four corners" test by which the trial judge simply looks at what is within the four corners of the writing and decides if the writing looks complete. The structure of section 2-202 seems less congenial to this test than earlier versions of the parol evidence rule. The section may not adopt any presumption that the entire agreement is embodied in the writing. A four corners test thrives more readily under a rule that presumes full embodiment in the writing unless only partial embodiment is proved. Further, Comment 3 to 2-202 may reject a four corners test. Usually a judge should be willing to go beyond the four corners and consider any proffered evidence on the issue of completeness and exclusivity. At minimum the judge must learn of the context and of the character of the terms not in the writing; otherwise he or she will be in the dark at least as to some of the respects in which the writing might not be complete and exclusive. . . . [905]

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202 cmt. 3 (1999); 2 NELSON & HOWICZ, *supra* note 834, § 13-29, at 95 & n.19. *See generally* 1 WHITE & SUMMERS, *supra* note 833, § 2-10, at 86-87 & nn.7-9 and authorities cited therein.

[905] 1 WHITE & SUMMERS, *supra* note 833, § 2-10, at 89-90 (footnotes omitted); *see also* 2 NELSON & HOWICZ, *supra* note 834, § 13-21, at 83 ("In order to make a determination of when a contract is the alleged full integration of all prior or contemporaneous negotiations, one must look to the conduct of the parties, to the contract language itself, and to the circumstances surrounding the making and performance of the contract."). Namely,

> [t]he parties may expressly provide that the written contract is the full and final integration of their agreement by including an integration or merger clause within the contract. While the existence of an integration or merger clause in a contract does not in itself render a writing as the complete and exclusive statement of the parties' agreement, it is strong evidence of the parties' intention that the written instrument is the complete embodiment of the contract.

2 NELSON & HOWICZ, *supra* note 834, § 13-29, at 95 (footnotes omitted).

That said,

> [t]he fact that the parties have integrated their contract through a merger clause which states that the writing is intended as a complete and

b. *Questions of Ambiguity*

As is true at common law,[906] even if the judge finds that the writing is fully integrated, she may admit extrinsic evidence (that does not contradict any integrated, unambiguous term) if she finds that one or more terms in the fully integrated writing is/are ambiguous.[907]

According to the Fifth Circuit, the Code

> adds a third level to the traditional two-level [ambiguity] inquiry. Instead of asking, "Were the contract terms ambiguous" and then, "If they were ambiguous what do they mean in light of extrinsic evidence," the Code poses *three* inquiries:
>
> 1. Were the express contract terms ambiguous?
> 2. If not, are they ambiguous after considering evidence of course of dealing, usage of trade, and course of performance?
> 3. If the express contract terms by themselves are ambiguous, or if the terms are ambiguous when course of dealing, usage of trade, and course of performance are considered (that is, if the answer to either of the first two questions is yes), what is the meaning of the contract in light of *all* extrinsic evidence?[908]

> exclusive statement of terms is not sufficient to negate the force of trade usage and course of dealing, because these are such an integral part of the contract that they are not normally disclaimed by general language in the merger clause.

1 HAWKLAND, *supra* note 821, § 2-202:3, at 2-187.

[906] *See supra* subpart III.A.3.b.

[907] *See* 2 NELSON & HOWICZ, *supra* note 834, § 13-28, at 92-93 ("While the court need not make a finding of ambiguity prior to the admission of evidence of consistent additional terms, if the court rules that the contract in question is ambiguous . . . or uncertain in any of its terms, then parol evidence as to the meaning of the terms in the contract may be admitted."); *see also* 1 WHITE & SUMMERS, *supra* note 833, § 2-10, at 99 & n.47 (observing that the reasons for admitting evidence of a course of dealing, usage of trade, or course of performance are even stronger if the writing is, *inter alia*, ambiguous, and citing cases in accord).

[908] *See* Paragon Resources, Inc. v. National Fuel Gas Distrib. Corp., 695 F.2d 991, 996 (5th Cir. 1983) (applying parallel Texas law).

With respect to the second and third "prongs,"

> parties who enter into a contract and are aware of some current usage of trade by implication can be said to have incorporated that usage into

The first inquiry is a question of law; the third inquiry is a question of fact.[909] The "thorny problem," in the words of the Fifth Circuit, is determining whether the second inquiry is one of law, fact, or both.[910] Neither the Mississippi courts nor the Fifth Circuit have as yet resolved this thorny question.

In both finding and resolving ambiguity, Mississippi courts should strive to construe the express terms of the written agreement, the parties' prior course of dealing, any relevant usages of trade, the parties' course of performance, any consistent additional terms, and any terms implied as a matter of law as being consistent one with another.[911] However, when

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> their written agreement, even where the contract seems clear and unambiguous and does not include any precise language concerning that usage. The Code has clearly indicated that as far as sales [or lease] contracts are concerned, any evidence of usage of trade . . . is admissible to make a determination concerning the parties' intention, even if the contract terms are not ambiguous.

2 NELSON & HOWICZ, *supra* note 834, § 13-44, at 111. The same rationale can clearly be applied to the parties' own course of dealing prior to the execution of the written instrument. And, with course of dealing, there is no question of whether the party against whom the course of dealing is offered knew or should have known, because it was a party to the course of dealing.

[909] *Paragon Resources*, 695 F.2d at 996.

[910] *See id.* Eleven years later, the Fifth Circuit again took the opportunity not to decide whether the effect of trade usage, course of dealing, and course of performance was to be determined by the court as a matter of law or by the trier of fact. *See* Bloom v. Hearst Entertainment, Inc., 33 F.3d 518, 522-23 (5th Cir. 1994) (quoting the passage above from *Paragon Resources*, observing that the *Paragon Resources* court did not resolve the question of who was to answer the second inquiry, and then failing to resolve the issue itself).

[911] MISS. CODE ANN. § 75-2-208(2) (1981). *See generally* 1 HAWKLAND, *supra* note 821, § 2-208:3, at 2-304. Professor Hawland writes that

> [t]he full meaning of many contracts may be determined only by considering their express terms in conjunction with the implied terms developed through resort to course of performance, course of dealing and usage of trade and augmented by the statutory (gap-filling) terms provided by the UCC itself. A bare bones sales contract usually will contain only three express terms – the description, quantity, and price of the goods. Important matters such as delivery, credit, quality and details of performance may be completely omitted. . . . Sections 1-205(4) and 2-208(2) direct[] the courts to try to harmonize the express terms that are provided in the written contract with the implied and statutory terms

such a construction is unreasonable, the Code prescribes the following hierarchy: (1) express terms control course of performance; (2) course of performance controls course of dealing; (3) course of dealing controls usages of trade; and (4) usages of trade control terms implied as a matter of law (*i.e.*, "gap fillers"),[912] other than "mandatory" terms.[913]

> that are to be determined by going outside of it. Additionally, the courts must try to achieve harmony among the implied terms whenever possible. In the bare bones sales contract which contains express terms only on price, description and quantity, the court may, for example, find the delivery term by resorting to course of dealing, the credit term by resorting to usage of trade, some details of performance by resorting to course of performance, and the warranty or quality term by resorting to the statutory gap-filling provisions of the UCC, found in this case in Sections 2-314 and 2-315.

Id. § 1-205:2, at 1-247 to -248 (footnote omitted).

[912] MISS. CODE ANN. §§ 75-1-205(5) & -2-208(2) (1981); *see* Mygsa, S.A. de C.V. v. Howard Indus., Inc., 879 F. Supp. 624, 630 n.9 (S.D. Miss. 1995); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 203(b) (1981) (setting forth the same priority scheme established in §§ 1-205(d) & 2-208(b) for all contracts, not only those governed by the UCC). *See generally* 1 HAWKLAND, *supra* note 821, § 1-205:2, at 1-248 to -250. Professor Hawkland writes that

> [t]hese priorities reflect the relative ability of the various concepts to determine the parties' actual intent. As the most reliable evidence of that intention, an express term of the contract controls any inconsistent implied term. Course of performance is considered the next best test of the parties' intention, because it relates to the very contract involved in the dispute, unlike course of dealing which relates to the sequence of conduct between the parties prior to the transaction at hand and may include dealings other than the current transaction. Because both course of performance and course of dealing involve the parties to the current dispute whose activities may reveal their own special way of doing business, these are better tests of meaning than is trade usage. Trade usage reflects only the normal conduct of the trade in a particular vocation or community and may not describe the idiosyncrasies of particular members.
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> . . . . In cases of conflict the statutory terms are subordinated in rank to course of performance, course of dealing and usage of trade. This subordination is sound because course of performance, course of dealing and usage of trade are methods of identifying the implied terms of the contract, part of the agreement itself, while the statutory terms are not part of any agreement between the parties.

1 HAWKLAND, *supra* note 821, § 1-205:2, at 1-251 to -252 (footnote omitted).

Section 2A-207(b) sets forth the analogous provision regarding lease contracts. MISS. CODE ANN. § 75-2A-207(2) (Supp. 1998).

[913] Professor Hawkland explains that

> The hierarchy established by Section 2-208(2) does not necessarily mean that evidence of trade usage, for example, may not be admitted to determine the meaning of an agreement, merely because it is inconsistent with evidence of course of performance or course of dealing. The hierarchy only emphasizes the weight to be given to various kinds of evidence, and does not go to its admissibility. Conceivably, in this connection, a court might prefer to make a finding on the basis of very strong evidence of trade usage, when contradicted by very weak evidence of course of performance or course of dealing.[914]

As is true with non-Code cases,[915] the construction and

> [M]andatory terms found in the UCC have absolute priority over any agreement of the parties, whether that agreement is expressed or implied through course of performance, course of dealing or usage of trade. It should be recognized, however, that the UCC mandates only a few terms and is generally committed to the ideal of freedom of contract. Consequently, efforts to defeat the force of agreements found through express terms or impliedly as a result of course of performance, course of dealing or usage of trade, usually have been unsuccessful.

1 HAWKLAND, *supra* note 821, § 1-205:2, at 1-250 to -251 (footnote omitted). Professor Hawkland offers the Code's statute of frauds as a prime example of a "mandatory" term in Article 2. *See id.* at 1-250 n.9.

[914] *Id.* § 2-208:3, at 2-304. Professors White and Summers are even more skeptical of the Code's hierarchy, arguing that "the provision that express terms control inconsistent course of dealing and its cohorts really cannot be taken at face value, at least in some courts." 1 WHITE & SUMMERS, *supra* note 833, § 3-3, at 120. They explain:

> [C]ourse of dealing and one or more of its cohorts may cut down or even subtract what would otherwise be whole terms of the express agreement of the parties. Section 1-205 says that course of dealing and usage of trade may "qualify" the express terms of the agreement. Thus, "delivery June-August" may be qualified by trade usage to require deliveries spread through these three months rather than all at once. And 2-208(1) on course of performance is drafted broadly enough to allow for the same kind of effect. A major function of course of performance, together with the law of modification and waiver, is to help cut down or subtract express terms altogether. Section 2-208(3) says that a course of performance inconsistent with any [express] term of the agreement "shall be relevant to show a waiver or modification" of the [express] term . . . .

Id. at 117-18 (footnotes omitted).

[915] *See supra* notes 32, 53 and accompanying text.

interpretation of an unambiguous contract for the sale or lease of goods is a matter of law for the court, while the construction and interpretation of an ambiguous contract for the sale or lease of goods, through the lens of extrinsic evidence of the parties' intent, is a matter of fact.[916] Thus, a trial court may properly grant summary judgment when a contract for the sale or lease of goods is unambiguous, but should not grant summary judgment when a contract for the sale or lease of goods is ambiguous and the parties' intent presents a genuine issue of material fact.[917]

IV. CONCLUSION

Extrinsic evidence, admitted or excluded by the operation of one or more of the rules of contract construction and interpretation at the disposal of Mississippi courts, often plays a dispositive role in contract litigation. The parol evidence rule – once thought to be a bastion which would turn away any unwanted agreements or evidence that added to, altered, or contradicted the express rights and obligations provided by a written contract – has been eroded by many judicially-created exceptions and exclusions, to say nothing of the exceptions embodied in the Uniform Commercial Code. Indeed, in light of the various statutory and common-law exceptions and exclusions, one might conclude that, to the extent that the parol evidence rule acts as a "rule" in cases governed by the Code, it does so more in the nature of an "enabling" rule, permitting parties to present extrinsic evidence that might otherwise be excluded, rather than an "exclusionary" rule, preventing parties from presenting extrinsic evidence that might otherwise be admissible. Moreover, many instances exist in which extrinsic evidence will be considered where the parol evidence rule is of no consequence.

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[916] Southern Natural Gas Co. v. Pursue Energy, 781 F.2d 1079, 1081 (5th Cir. 1986) (applying Mississippi law) (citing Carpenters Amended & Restated Health Benefit Fund v. Holleman Constr. Co., 751 F.2d 763, 766-67 (5th Cir. 1985), and Paragon Resources, Inc. v. National Fuel Gas Distrib. Corp., 695 F.2d 991, 995-96 (5th Cir. 1983)).

[917] *Id.* (citing Union Planters Nat'l Leasing, Inc. v. Woods, 687 F.2d 117, 120 (5th Cir. 1982), and Freeman v. Continental Gin Co., 381 F.2d 459, 465 (5th Cir. 1967)); *see also supra* subpart III.A.6, discussing the propriety of summary judgment in cases governed by the common law parol evidence rule.

Over time, courts, primarily in other jurisdictions, seem to have concluded that this result is not all bad – and they are probably correct. Given that the stated purpose of contract construction and interpretation is to give maximum effect to the intent of the parties at the time they executed the agreement, that purpose may indeed be better served by a rule that does not screen out relevant evidence simply because there exists a written instrument that appears on its face to be complete and unambiguous. Unfortunately, such a rule is not currently followed by the Mississippi Supreme Court except in cases governed by the Uniform Commercial Code – and then, it seems at times, only grudgingly.

One consequence of the Mississippi Supreme Court's unwillingness to follow the lead of the *Restatement (Second) of Contracts*, the Uniform Commercial Code by analogy to non-Code cases, leading treatises and commentators, and a majority of sister jurisdictions with respect to non-Code cases is that parties to contracts and other similar instruments governed by Mississippi common law face a markedly different set of rules that will be used to construe and interpret their written agreements than they might be accustomed and/or entitled to in other jurisdictions. Whether that, in turn, encourages or discourages non-Mississippians to contract with Mississippians is a question for another day – even if we assume that non-Mississippians know of and understand the difference between the Mississippi Supreme Court's approach to contract construction and interpretation and that followed by a majority of other jurisdictions, there is certainly room to debate whether Mississippi's approach increases or decreases the frequency of disputes over the meaning and consequence of the terms of a written contract and the predictability of the outcome of those disputes. What does seem clear is that a non-Mississippian who is unaware of Mississippi's approach to contract construction and interpretation may be in for a pleasant surprise or a rude awakening, depending on which side he takes in the writing-versus-extrinsic-evidence issue.

Another consequence of the Mississippi Supreme Court's unwillingness to follow the lead of the *Restatement*, the Code by analogy to non-Code cases, leading treatises and commentators, and the "majority rule" of sister jurisdictions with respect to non-Code cases is that parties to contracts and other similar instruments governed by Mississippi common law face a markedly different set of rules that will be used to construe and interpret their written agreements than will be used to decide otherwise identical disputes in cases that are governed by the Mississippi Uniform Commercial Code. Depending on whether one thinks that the Code or the court has it right, the fact that different rules apply to Code and non-Code cases may be troubling because it affords "better" treatment to one class of disputes and disputants than to another. Moreover, the variance between the Code approach and the court's approach in non-Code cases may cause problems for lower courts trying to "get it right" in the first place.

A final consequence of the Mississippi Supreme Court's unwillingness to follow the lead of the *Restatement*, the Code by analogy to non-Code cases, leading treatises and commentators, and the "majority rule" of sister jurisdictions with respect to non-Code cases is that the outcome of non-Code cases may tend to hinge more on the applicability of one or more exceptions to the common law parol evidence rule than on the application of a well-reasoned process of construction and interpretation.

Until the Mississippi Supreme Court decides to abandon a "four corners" approach to construction and interpretation and embrace a more modern contextual approach, if ever, Mississippi judges, lawyers, and litigants – and those in other jurisdictions who are asked or compelled to apply, explain, or adhere to Mississippi law – need to understand the rules, guides, and exceptions discussed in this article and in the source materials from which it draws. I hope the reader finds it educational.

BASTARDY AND THE STATUTE OF WILLS: INTERPRETING A SIXTEENTH-CENTURY STATUTE WITH CASES AND READINGS

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The Statute of Wills of 1540 created a tax loophole for transfers of property to illegitimate children.[1] Assessments for

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[1] Throughout this study, unless otherwise indicated, the term "Statute of Wills" refers to both the Statute of Wills, 32 Hen. VIII, c. 1 (1540), 3 STATUTES OF THE REALM 744-46 (hereinafter "Stat. Wills"), and the Explanation of the Statute of Wills, 34 & 35 Hen. VIII, c. 5 (1542), 3 STATUTES OF THE REALM 901-04 (hereinafter "Stat. Expl.").

There is substantial literature on the legal status and social history of bastardy during the sixteenth and seventeenth century, a topic not addressed by this study. *See generally* Walter J. King, *Punishment for Bastardy in Early Seventeenth-Century England*, 10 ALBION 130-51 (1978); BASTARDY AND ITS COMPARATIVE HISTORY 49 (Peter Laslett, et al. eds., 1980); JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE (1987); WILLIAM CLERKE, THE TRIALL OF BASTARDIE (London, 1594); CHRIS GIVEN-WILSON & ALICE CURTEIS, THE ROYAL BASTARDS OF MEDIEVAL ENGLAND (1984); R.H. HELMHOLZ, CANON LAW AND THE LAW OF ENGLAND (1987); RALPH A. HOULBROOKE, CHURCH COURTS AND THE PEOPLE DURING THE ENGLISH REFORMATION 1520-1570 (1979); THE ENGLISH FAMILY 1450-1700 (1984); MARTIN INGRAM, CHURCH COURTS, SEX, AND MARRIAGE IN ENGLAND, 1570-1640 (1987); PETER LASLETT, FAMILY LIFE AND ILLICIT LOVE IN wardships that would normally be imposed on certain transfers of land to children could be effectively avoided by establishing that the donee was illegitimate, and therefore a stranger to the donor for the purposes of the statute. English lawyers in the sixteenth and seventeenth centuries educated their colleagues about this newly available tax loophole. In the inns of court, they discussed the statutory provisions and recent revenue cases from the Court of Wards. They considered hypothetical situations to define who was and who was not a bastard for the purposes of the statute. The first part of this study will briefly set this tax loophole in the general institutional context of both the Statute of Wills and the common law educational system in England. The second part of the article examines the problem of how being an illegitimate child of a donor created a favorable tax situation under the Statute of Wills. Concluding observations will then show how this example sheds light on the relationship between the inns and the courts, and on how these institutions overlapped and interacted as they grappled with interpreting ambiguous statutory language.

I. INSTITUTIONAL BACKGROUND

The English Statute of Wills of 1540 must be seen as one of many statutory enactments resulting from the Henrician Reformation, the dissolution of the monasteries, and Henry VIII's effective program to increase royal revenues. Although other forms of wealth were appearing in English society during these years, land and rights in land continued to be the context in which most wealth was perceived. Transfers of land, particularly upon the death of the owner, were convenient points to assess and collect feudal incidents and royal prerogative rights, which were by this date expressed in money payments.[2] Many of Henry's political maneuvers and sub-

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EARLIER GENERATIONS (1977); IVY PINCHBECK & MARGARET HEWITT, CHILDREN IN ENGLISH SOCIETY VOLUME I: FROM TUDOR TIMES TO THE EIGHTEENTH CENTURY (1969); LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800 (1977).

[2] The political and fiscal considerations leading to the Statute of Wills and

sequent enactments attempted to reimpose such incidents. In fact, the Statute of Wills is most accurately viewed as a taxation statute that happened to create the right to devise a certain portion of land.[3]

Two relevant aspects of this period's unprecedented statutory activity must be noted. First, new statutes provided for the creation of new institutions of administration and adjudication, such as the Court of Wards. Second, new statutory provisions called for authoritative interpretations by the profession. The method of legal education in the inns of court concerning the manner in which readings on statutes were conducted changed accordingly. Readings became the individual products of the particular reader and often addressed recent case interpretations of statutory provisions. This article addresses one example of this second change which can best be understood after considering the general nature of the Court of Wards and the readings.

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the Explanation of the Statute of Wills have been treated fully elsewhere. *See generally* 2 J.H. BAKER, THE REPORTS OF SIR JOHN SPELMAN 192-203 (Selden Soc'y vol. 94, 1978); J.M.W. BEAN, THE DECLINE OF ENGLISH FEUDALISM 1215-1540 (1968); A.R. Buck, *The Politics of Land Law in Tudor England, 1529-1540*, 11 J. LEGAL HIST. 200-17 (1990); N.G. Jones, *The Influence of Revenue Considerations upon the Remedial Practice of Chancery in Trust Cases, 1536-1660, in* COMMUNITIES AND COURTS IN BRITAIN 1150-1900 99-113 (Christopher Brooks & Michael Lobban eds., 1997); Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 237-39 (1995); Prue Vines, *Land and Royal Revenue: The Statute for the Explanation of the Statute of Wills, 1542-43*, 3 AUSTL. J. LEGAL HIST. 113-30 (1997).

I disagree with Ms. Vines's conclusion concerning the provision addressing the testamentary capacity of married women. She states that "the need to clarify the position as to capacity resulted not from poor drafting in the *Statute of Wills*, but from the conflict between the ecclesiastical courts and the common law courts in relation to wills and estates." *Id.* at 129. In my view, lawyers saw the problem purely within the common law and statutory interpretation as indicated by their discussions in the inns of court. M.C. Mirow, *Monks and Married Women: The Use of the Yearbooks in Defining Testamentary Capacity in Sixteenth- and Seventeenth-Century Readings on Wills*, 65 LEGAL HIST. REV. 19-39 (1997).

[3] The statute does not have a single taxing provision, but must be read almost in its entirety to determine its operation.

A. *The Court of Wards*

The predecessors of the Court of Wards and Liveries were the individual receivers for the counties under Henry VII, who were charged with collecting the king's revenues from wardships and other incidents of lands held of him.[4] Centralized control over the collection and administration of these incidents grew during the reigns of Henry VII and Henry VIII, and by 1528, a Master of the Wards sat regularly at Westminster, conducted judicial business, and was assisted by an attorney.[5] The statutes creating the Court of Wards are seen as formalizing a pre-existing institution whose main activities were increased substantially by two legislative changes: on one side, the Statute of Uses and Statute of Wills, and on the other, the requirement that grants of monastic lands by the Court of Augmentations be held in knight-service in chief tenure.[6] Thus, the decisions of the court provided the most current interpretations of the statutory provisions concerning wardship and other incidents and therefore should have been essential material for a student of such statutes.

At least two of the readers studied here had positions with the court. Robert Nowell, who read in 1561, was appointed the Attorney of the Court of Wards that same year.[7] Hugh Hare, with his apparently more industrious brother John, was appointed Clerk of the court in 1589.[8] Furthermore, any of the readers later made serjeants or judges of the common law courts might have been involved in deciding a case.[9] Whatever the personnel used to reach a decision, it was "normally embodied in a formal decree of the court."[10] Another reader of note on the Statute of Wills was Henry Sherfield. His successful practice before the Court of Wards has been recounted by Prest, and his iconoclastic church window smashing has been illuminated by the work of Slack.[11] Reading on the Statute of Wills also served James Dyer, John Popham, and Augustine Nicholls well; each was to have a successful judicial career.

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[4] H.E. BELL, AN INTRODUCTION TO THE HISTORY AND RECORDS OF THE COURT OF WARDS AND LIVERIES 5-6 (1953).

[5] *Id.* at 12.

[6] The two statutes are 32 Hen. VIII, c. 46, and 33 Hen. VIII, c. 22. BELL, *supra* note 4, at 14.

[7] *Id.* at 22, n. 4.

[8] *Id.* at 26-27.

[9] *Id.* at 98.

[10] *Id.* at 100.

Aside from the pleadings in the cases, the most important official documents preserving the workings of the Court of Wards are the Books of Orders which are relatively complete, and the Books of Decrees which run from about 1572 to 1645.[12] Supplementing these records are the manuscript reports of decrees for cases from 1553 to 1581 by John Hare.[13] James Ley was Attorney of the Court of Wards from 1608 to 1621; his reports of seventy-five cases from the reign of James I, subsequently published in 1659, and his *Learned Treatise Concerning Wards and Liveries* (published 1641 and 1642) are useful sources.[14] The Court was abolished in 1646.[15]

B. Readings

Educational activities in the inns of court ranged from informal student-run gatherings to elaborate, ritualistic events conducted by senior members of the profession. The readings were the most formal, and perhaps the most technical or sophisticated, of these activities.[16] Within the inns, the period during a reading was a time for education, institutional promotion, and social functions. Readings delivered an intensive dose of legal learning to the audience, gave the reader an opportunity to display his knowledge, were closely associated with a senior utter-barrister's elevation to bencher of an inn, and provided convenient times for the members of the profession to dine together.[17]

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[11] WILFRID R. PREST, THE RISE OF THE BARRISTERS: A SOCIAL HISTORY OF THE ENGLISH BAR, 1590-1640 30-34 (1986). Paul Slack, *The Public Conscience of Henry Sherfield, in* PUBLIC DUTY AND PRIVATE CONSCIENCE IN SEVENTEENTH-CENTURY ENGLAND 151-71 (John Morrill, et al. eds., 1993); *Religion Protest and Urban Authority: The Case of Henry Sherfield, Iconoclast, 1633, in* 9 STUDIES IN CHURCH HISTORY 295-302 (Derek Baker ed., 1972); *Poverty and Politics in Salisbury 1597-1666, in* CRISIS AND ORDER IN ENGLISH TOWNS, 1500-1700 164-203 (P. Clark & P. Slack eds., 1972).

[12] BELL, *supra* note 4, at 87-88.

[13] *Id.* at 90. CUL MSS Dd.3.9, Hh.3.1, and Ii.5.7.

[14] Apart from Bell's study, see JOEL HURSTFIELD, THE QUEEN'S WARDS; WARDSHIP AND MARRIAGE UNDER ELIZABETH I (2d ed. 1973) for a general description of the court and wardships.

[15] BELL, *supra* note 4, at 150.

[16] Case-putting, bolts, and moots were the law student's "daily fare" according to Prest or his "bread and butter" according to Lemmings. DAVID LEMMINGS, GENTLEMEN AND BARRISTERS: THE INNS OF COURT AND THE ENGLISH BAR, 1680-1730

Despite their depth of analysis and legal complexity, the readings contain similar material to that found in the less formal exercises. Even in this later period of original authorship, readers might borrow substantial portions of text from earlier readings on the same or similar topics.[18] It is very likely that they were accessible to their audience, pedagogically valuable, and after their delivery provided relatively cohesive statements of law in a particular area.[19] Thus, the readings can properly be regarded as one end-point of the continuum of the inns' educational devices, and, in many instances, the most sophisticated treatments of contemporary topics available.

A reading was a structured exegesis of a statute or a particular provision of a statute. Although before this period there was a pattern or cycle to the statutes selected as the

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77 (1990); WILFRID R. PREST, THE INNS OF COURT UNDER ELIZABETH I AND THE EARLY STUARTS, 1590-1640 117-19 (1972); *See also* W.C. RICHARDSON, A HISTORY OF THE INNS OF COURT: WITH SPECIAL REFERENCE TO THE PERIOD OF THE RENAISSANCE 128-66 (1978). Almost all exercises and lectures were oral, with very little emphasis being placed on the production of written work. *Id.* at 100. A useful survey of the exercises in the inns of chancery and the inns of court and of the relationship between the two types of inns during this period is found in 2 J.H. BAKER, THE REPORTS OF SIR JOHN SPELMAN 125-35 (Selden Soc'y vol. 94, 1978).

[17] While one might suppose that reading was a necessary prerequisite to elevation to the bench, evidence indicates that utter-barristers could be made benchers first with the obligation later imposed to read. Ives even describes this as a "regular procedure" in Lincoln's Inn. E.W. Ives, *Promotion in the Legal Profession of Yorkist and Early Tudor England*, 75 LAW Q. REV. 348, 351 (1959).

[18] J.H. BAKER, JOHN SPELMAN'S READING ON QUO WARRANTO xvi-xxi (Selden Soc'y vol. 113, 1997).

[19] M.C. Mirow, *The Ascent of the Readings: Some Evidence from the Readings on Wills, in* LEARNING THE LAW: TEACHING AND THE TRANSMISSION OF ENGLISH LAW, 1150-1900 227-54 (Jonathan A. Bush & Alain Wijffels, eds., 1999).

topics for the readings, by the date of the readings studied here, readers apparently had free choice in selecting their statutes. The presentation and content of readings changed throughout the life of the institution, and it is generally agreed that the addressing of new statutes marked a new era in the readings.[20]

The fullest contemporary account of readings in the inns of court describes a substantially similar procedure in all the inns:

> And then the first day after Vacation, after 8 of the clock, he that is so chosen to read openly in the Hall before all the company shall read some one such act, or statute, as shall please him to ground his whole Reading on, for all that vacation; and that done, doth declare such inconveniences and mischiefs as were unprovided for and now by the same statute be amended; and then reciteth certain doubts and questions which he has devised that may grow upon the said statute, and declareth his judgment therein. That done, one of the younger utter-barristers rehearseth one question propounded by the Reader, and doth by way of argument labour to prove the Reader's opinion to be against the law.[21]

Readings were delivered during the Lent and autumn (or summer) learning vacations of an inn. A reader's first reading was usually conducted in the autumn, and Lent was the usual time for his second, or "double," reading, which was often given before the reader was called as a serjeant.[22] The second reading, several years after the reader's first reading, was considered to be an even more learned and ceremonial occasion than the first.[23]

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[20] Louis A. Knafla, *The Matriculation Revolution and Education at the Inns of Court in Renaissance England*, *in* TUDOR MEN AND INSTITUTIONS 232, 252-53 (Arthur J. Slavin ed., 1972); PREST, *supra* note 16, at 119-20.

[21] REPORT OF NICHOLAS BACON, THOMAS DENTON, AND ROBERT CAREY ON THE STATUS OF LEGAL EDUCATION IN ENGLAND, PRESENTED TO THE KING, c. 1540, *reprinted in* RICHARDSON, *supra* note 16, at 415. For a discussion and edition of this report see D.S. Bland, *Henry VIII's Royal Commission on the Inns of Court*, 10 J. SOC'Y PUB. TCHRS. L. 178 (1968). R.M. Fisher, *Thomas Cromwell, Dissolution of the Monasteries, and the Inns of Court*, 1534-1540, 14 J. SOC'Y PUB. TCHRS. L. 103 (1980) contains further discussion of the origins of this report and editions of related papers concerning Lincoln's Inn and Middle Temple.

[22] J.H. BAKER, THE ORDER OF SERJEANTS AT LAW 84-85 (Selden Soc'y Supp. Series vol. v, 1984). There were elaborate rules for giving a serjeant elect the

On the first morning of the reading, the reader entered the hall, stood at the cupboard, and took the Oaths of Supremacy and Allegiance.[24] The sub-lecturer then read the statute, or the applicable "branch" thereof, upon which the reader conducted his reading. The reader delivered a "grave and apologetic" speech explaining his choice of the statute and setting forth the divisions of his reading.[25] The reader would then set out ten to twelve cases on the division, in the form of hypothetical factual situations for argument. From a list of these cases, the least senior cupboardman would choose one and argue against the reader's conclusion.[26] The chosen case would then be argued up the hierarchy of seniority through the other cupboardmen, positioned near the cupboard, and benchers, "who are placed on a form opposite the reader."[27] The reader then would speak defending his position, followed by any judges and serjeants present who would "argue" the case chosen.[28] Thus, we may

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opportunity to read before the return of his writ. WILLIAM DUGDALE, ORIGINES JURIDICIALES, OR HISTORICAL MEMORIALS OF THE ENGLISH LAWS, COURTS OF JUSTICE . . . INNS OF COURT AND CHANCERY (London, 2d ed. 1671; first published 1666). Dugdale made use of the account in JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIE 114-21 (photo. reprint 1979) (S.B. Chrimes ed. 1942) (*c.* 1470) and the report quoted above. KENNETH CHARLTON, EDUCATION IN RENAISSANCE ENGLAND 172 (1965). Readers were elected from the senior utter-barristers of an inn who had held such positions for about ten years, in other words, those who had been members of an inn for between sixteen and eighteen years. J.H. BAKER, *English Legal Profession, 1450-1550, in* THE LEGAL PROFESSION AND THE COMMON LAW 75, 91 (1986).

[23] Richardson, *supra* note 16, at 106.

[24] *Id.* at 206. The oath was first required by 5 Eliz. c. 1, s. 4 (1563), 4 STATUTES OF THE REALM 403. In the Inner Temple if attendance was insufficient, the reader, benchers, and utter-barristers could amerce those absent and dissolve the reading. DUGDALE, *supra* note 22, at 160.

[25] *Id.* at 206. A division of the reading was a specific legal question arising from the statutory text and was often the subject of one day's lecture.

[26] The cupboardmen were usually the four most senior utter-barristers present at the reading. *Id.* at 203.

[27] *Id.* at 206.

[28] *Id.* It is not clear whether the judges and serjeants would be attempting to support the reader's conclusions or merely arguing the points of law in the case.

think of the Inner Temple representation as accurate for the method of argumentation in all the inns, "all of which is to be done *ex tempore pro and con.*"[29] Abbreviated arguments might run into the evening.[30]

This outlines the first day's events, and the following days of the reading were similar. The reading and its argument of cases were conducted Mondays, Wednesdays, and Fridays, interspersed with feasting and entertaining strangers, often "great lords."[31] By all accounts and attempted regulations, the readings were expensive events.

At the end of the final day of a reading, the reader would deliver a speech which was followed by the most senior bencher's remarks. The reader's final speech might have taken the form of a repetition or summary of his reading, repeating his divisions and perhaps important conclusions.[32] The cases were then presented for the "division for that day."[33] Two cupboardmen would argue one case and ask the reader's opinion on the case to be given the next term.[34] In response, the reader made a short speech and retired without addressing the substance of the case, a symbol of the continuous nature of legal education in the inns. This ceremony was followed by a

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Nonetheless, from their position in the hall alone, sitting opposite the benchers with their backs to the reader, it seems more likely than not that they would support the reader's position. In the Inner Temple a second case would be argued in the morning. This was chosen by the most senior utter-barrister or a judge. *Id.* at 160.

[29] *Id.*

[30] *Id.* at 207. In the Inner Temple, at the end of the morning session, the "reader delivers his Paper of Cases, for that morning to the puisne Vacation utter-barrister, who is to argue one of those cases he likes best, immediately after dinner, at the Bench Table end." The utter-barrister would be aided by all the barristers present, helping him "to break the case and open the points." After the benchers argued, the reader would conclude. *Id.* at 160. We should not forget that "[a] reading was also a festive occasion, an opportunity for 'wining and dining the right people.'" E.W. IVES, THE COMMON LAWYERS OF PRE-REFORMATION ENGLAND: THOMAS KEBELL: A CASE STUDY 50 (1983).

[31] DUGDALE, *supra* note 22, at 207.

[32] PREST, *supra* note 16, at 124.

[33] DUGDALE, *supra* note 22, at 207.

[34] *Id.* at 207-08.

procession through the streets and dinner in the hall.[35]

The duration of the reading, according to Dugdale, was two days less than a fortnight.[36] This would provide six reading days. Earlier accounts indicate that the common duration was between a period of three weeks and three days and a period of two weeks.[37]

It was within the context of such readings that the following example must be examined. The most important decisions concerning the interpretation of the Statute of Wills were in the Court of Wards, and the readings in the inns of court provide the setting for tracing the development of the applicable provisions of the Statute.

II. TRANSFERS TO ILLEGITIMATE CHILDREN UNDER THE STATUTE OF WILLS

The permissive language of the Statute of Wills relating to devises and acts executed during the lifetime of the donor created difficulties in the complex area of wardship. The Statute of Wills states that each person

> shall have full and free liberty, power, and authority to give, dispose, will, and devise, as well by his last will and testament in writing, or otherwise by any act executed in his life, all his said manors, lands, tenements, or hereditaments, or any of them at his free will and pleasure; any law, statute, or other thing heretofore had made or used to the contrary notwithstanding.[38]

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[35] *Id.* at 208.

[36] *Id.* at 207.

[37] PREST, *supra* note 16, at 124; J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 184 (3d ed., 1990); DUGDALE, *supra* note 22, at 194. Indicating that a skeleton of a longer period remained even in Dugdale's day is his note that although the reader ends his reading after a fortnight, the associated exercises continue for the "reading month" conducted "by readers or vacationers . . . as if the Reading has so long continued." *Id.* at 160.

[38] Stat. Wills, s. 1. Other sections referring to tenures other than socage tenure have similar language but replace "free will and pleasure" with "will and pleasure." Stat. Wills, ss. 2, 3, and 4. The Statute of Wills, s. 5, addressing socage tenure, uses again "free will and pleasure."

The Statute of Wills adds further language when the land is held in knight-service in chief and similar tenures. Here, each person may

> give, dispose, will or assign two parts of the same manors, lands, tenements, or hereditaments in three parts divided . . . *to and for the advancement of his wife, preferment of his children, and payment of his debts, or otherwise at his will and pleasure*; any law, statute, custom, or other thing to the contrary notwithstanding.[39]

The third part not transferred under this provision was subject to wardship, primer seisin, and livery.

The Explanation of the Statute of Wills repeats this language with these purposes in its preamble and then incorporates the language of the Statute of Wills in its section on wardship. The Explanation of the Statute of Wills speaks of a donor's

> gift, disposition, or devise by his last will in writing, or otherwise by any act or acts lawfully executed in his life, to his wife, children, or otherwise.[40]

These provisions created wardship obligations where none had existed before their enactment. Ley states that there is "no dying seised, nor descent" but nonetheless there is "wardship during the minority."[41] Concerning this provision, Bell states:

> [I]f the statutes had given the subject a limited freedom to devise, they had also given the king certain wardships and primer seisins, where he would have had none before—that is, on one third of land conveyed during life for the purposes mentioned in the statute. Thus the statutes and the common law were to some extent contradictory, and much learning was displayed in argument as to whether or not, in a particular case, an heir was in ward or should sue livery.[42]

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[39] Stat. Wills, ss. 2 and 3 (emphasis added). Stat. Wills, ss. 4 and 5 state "in manner and form as above declared."

[40] Stat. Expl., preamble and s. 4.

[41] J. LEY, A LEARNED TREATISE CONCERNING WARDS AND LIVERIES 25 (1641).

[42] BELL, *supra* note 4, at 107.

Thus, the contemporary practitioner was presented with a new statute creating new financial responsibilities to the king. These were, no doubt, important provisions, which were subsequently litigated. As the following discussion indicates, the interpretation of these provisions was not obvious.

The words "or otherwise" were the source of much difficulty, and it was not for another thirty-five years that their interpretation would be settled. From the plain language of the statute, it was unclear to what "or otherwise" referred: did the statute mean that any disposition by will or by the lifetime act of the donor for any purpose should incur primer seisin or wardship for land held by knight-service in chief? Clearly, when land held in knight-service in chief was devised or given in the lifetime of the donor *for the stated purposes*, the incidents were due to the king. In 1548-49, the first judicial interpretation of this provision indicated a broad reading of the language to make any transfer taxable:

> Note, for law by the Chancellor of England and justices, that if the tenant who holds of the king in knight-service *in capite*, gives all his land to a stranger, by act executed in his life, and dies; yet the king shall have the third part in ward, and shall have the heir in ward if he be within age. And if of full age, he shall have primer seisin of the third part, by virtue of that clause in the statute "Saving to the king ward, primer seisin, livery" and the like, by which it appears that the intent of the act is that the king shall have as much as if the tenant had made a will, and had died seised. Yet by all, after the king is served of his duty of it, the gift is good to the donee against the heir.[43]

Here, even apart from the three purposes expressed in the act, wardship, primer seisin, and livery attach to *any* disposition of land held in knight-service in chief. If this interpretation was followed, further discussion on the provision would have been unnecessary.

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[43] Anon. (1548-49), 2 Edw. VI, Brooke's New Cases 179, 73 E.R. 925.

By 1561, however, this interpretation of the statute was being questioned. A reader in Gray's Inn, Robert Nowell, provided some thoughts on the nature of conveyances during the donor's life ("acts executed") in relation to wills as part of his reading on the Statute of Wills:

> And therefore the cause wherefore acts executed are made mention of in this statute is not to the intent to give men power to convey their lands away which they might do before, but to bring the saying which follows after for the advantage of the prince and the lord giving as it seems the third part in every case and upon every conveyance made mention of before by act executed where the heir is within age, the land is held by knight-service, to the intent that the prince and the lord by knight-service might receive a benefit of a third part upon conveyance by act executed as they sustained the loss of two parts upon conveyance by last will and testament. *And the conveyances by act executed in this statute are not simply and generally all manner of conveyance by act executed*, but [are] those conveyances within [the statute] and properly are most like to wills and do provide a remedy for those things which men most commonly provide for in wills, for their wives, children and payment of their debts, for the words of the statute be that a man shall have full power and authority by any act lawfully executed to give and dispose will and assign etc. to and for the advancement of his wife, preferment of his children, and payment of his debts or otherwise at his will and pleasure.[44]

Thus, by 1561, lawyers were arguing for a more restricted reading of the statute's application. Only transfers for the specific reasons stated in the statute were to produce the imposition of a payment to the crown. Of the three specific purposes expressed in the statute, the meaning of "advancement of children" was apparently put before the courts most often.[45] The question presented in these cases was whether certain persons should be considered "lawful generation" for the purposes of advancing children within the language of the statutes. The phrase "lawful generation" is found in the preamble of the Statute of Wills, and if an advancement to a child of lawful generation was established, wardship or primer seisin would attach for the conveyance of land held in knight-service in chief. Thus, the crucial issue was the applicability of the sections of the statutes dealing with wardship and the suing of liveries for lands "advanced" to certain family members during the lifetime of the donor. A significant body of law developed around the question of what was or was not advancement under various circumstances, but in the late 1560s and early 1570s, the law was still open to varying interpretations.

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[44] BL MS Harley 829, f. 28 (emphasis added).

[45] Why the terminology changed from "preferment of children" in the statute to "advancement of children" in the contemporary language of the practitioner is not known. This study follows the lawyers rather than the statute in this regard. For advancement of a wife, see *Floyer's Case* (1611), Hil. 8 Jac. 1, 9 Co. Rep.

An early case interpreting this provision is from 1568. A manuscript of Henry Blanchard's reading in 1581 records that an estate executed to a bastard daughter or son was not within the statute as it regards wardship and the suing of livery. For this proposition he cited the case of *Dame Woodhouse*.[46] Although the case is not available in printed reports, Hare's manuscript reports of Court of Wards cases contain the following entry from 1568:

> Madam Woodhouse being seised of the manor of A. held in knight-service in chief made feoffment of this in consideration of marriage to be entered between Ursula, base daughter of the said Madam, and William Cotton to the use of him for his life, the remainder to the said William and Ursula in tail, the remainder to the right heirs. The said Madam Woodhouse dies having issue, Dudley Arundell by her second husband, and her daughter as heir. The which matter was found accordingly by office upon the death of the Madam, upon which office the said auditor understanding that the said Ursula

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125b, 77 E.R. 913, where advancement given to a woman in contemplation of marriage is held within the statutory definition of "wife."

[46] CUL MS Hh.2.1, f. 72. The case of *Madam Woodhouse* is noted at 73 E.R. 776 as being located in the Decree Book of the Court of Wards at f. 327 for the Trinity term of 10 Eliz. (1568). This Decree Book which corresponds to P.R.O. Ward 9/83 has been classified as "unfit for production" by the P.R.O.

> shall be said one of the daughters of the said Madam and [therefore] issue within the Statute of Wills, charged the third part for fault of livery. *But upon grand advice and deliverance of the justices on this point they resolve that the said base daughter shall take this land as a mere stranger and not as any child [of] the said Madam as issue. The conveyance [was made] out of the power of the aforesaid statute* upon which she made discharge by decree of livery etc.[47]

By 1568, a bastard daughter would not be considered a child for the purposes of assessing wardship or suing livery upon advancement by act executed during the life of the parent.

A second similar case is from 1570.[48] There, land held in knight-service was conveyed to the bastard son of the donor, but the son was "not called bastard or son to the donor."[49] Finding that the bastard son was out of the statute's application, the court stated:

> And as it seems the bastard shall be out of the statute, because he is, but as any other person, a mere stranger to the father, *quia filius nullius*. And the preamble of 32 Henry VIII [c.1] rehearseth "lawful generation."[50]

Consistent with *Madam Woodhouse* on the question of the applicability of the statute to bastard sons, its focus on the fact that the bastard was not recognized or accepted as the son the donor is notable. The donor's or public's perception of the familial relationship appears to have been a consideration in the proper characterization of the son.

Other related provisions of the Statute of Wills were being debated that same year. Dyer reports a discussion of these provisions in the Court of Wards in 1570.[51] This discussion indicates that after more than twenty-five years from the enactment of the statutes the law on this subject was unsettled. The general question concerned advancements "in consideration of natural love and affection to his kindred and blood" with lands held in knight-service in chief. A relative other than one in the direct family line presented a difficult case. The judges were divided:

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[47] CUL MS Ii.5.17, ff. 31v-32 (emphasis added).

[48] Anon. (1570), Mich. 12 & 13 Eliz., 3 Dyer 296b, 73 E.R. 666. This case is a few months later than the first discussion of the question of collateral relatives in the Hilary term of 12 Elizabeth addressed next.

[49] *Id.*

[50] 73 E.R. 666.

[51] Anon. (1570), Hil. 12 Eliz., 3 Dyer 386b, 73 E.R. 642.

> And in a meeting of all the judges at Serjeants Inn, it was holden by Onslow Attorney of the Wards, Wray, and Barham the Queen's serjeant, Harper Justice, Welshe Justice, Saunders Chief Baron, and Dyer Chief Justice of the Bench, that children's children, and so on, descending in a right line, are within the statute etc., and this by the words in the preamble, "generations, family, children, and posterity."[52] And Dyer also thought that collateral cousins should be in the same predicament. But Keilwey Surveyor of the Liveries, Carus, Southcot, Weston, and Whiddon Justices, *contra*, in both points, etc. and Catlin Chief Justice also: but Saunders Chief Baron, only in one as above. And in next Trinity, in the lodgings of Secretary Cecil, Master of the Wards, near the Savoy, the case was argued for four hours and half, and the opinions [were] as above, except Carus, who changed his opinion.[53]

Thus, at the beginning of 1570, there was little agreement about how the statute was to be interpreted on this point. These were also questions considered to be worth long and repeated debate by the country's top judiciary. It should be noted that Dyer read the statute broadly to include children's children and collateral cousins. The important point for our purposes is that the interpretation of the three purposes clearly had become more restrictive, excluding strangers and others from its application. The discussion examines twice the statutory language regarding the three purposes of the disposition, once to note its presence in the Statute of Wills, and again to note its absence in the individual section of the Explanation of the Statute of Wills concerning knight-service in chief:

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[52] These words are used in isolation from each other in the Statute of Wills, preamble.

[53] 73 E.R. 643.

> Also, in the third article of the Statute of Explanations, 34 & 35 Henry VIII [c.5] it is declared and enacted that the king's tenants in chief hath, and by that act shall have authority to dispose, etc., to any person or persons (except bodies politic and corporate) by will or writing, or act executed in life, two parts, etc. omitting the words, "to and for the advancement of the wife, preferment of the children, payment of the debts, or otherwise." Wherefore, etc. Therefore, note the generality, etc. And Cecil argued sensibly to the same intent.[54]

Considering the recital of these requirements in the clause creating the saving to the king, it is a puzzling argument.[55] It is not surprising, however, to find Cecil, as Master of the Wards, arguing for a broad application of the statute.

Despite these discussions and although there were four other readers on the Statute of Wills in the inns of court between 1561 and 1581, it appears that it was not until Blanchard's reading of 1581 that the possible issues were given a full treatment. This was most likely due to the rapidly developing case law in the area at that time and the increasing availability of reports.[56] After Blanchard's reading, the readings routinely provide a summary of the major issues of advancement under the statute.

The question of whether a bastard was "lawful generation" was presented again in a case which became known as *Gray's Case*.[57] The case concerned Edward Gray who was Lord

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[54] 73 E.R. 643.

[55] Stat. Expl., s. 4.

[56] Many factual variations are presented in the reader's cases in St John's College, Cambridge MS 5.28, ff. 55-58. MSS of Blanchard's reading also provide good narrative discussions of the topic. BL MS Add. 16169, ff. 262v-263v and BL MS Add. 35951, ff. 21v-24. Dyer's reports were printed in 1585, but manuscript reports circulated before this date.

[57] *Gray's Case* (1572), Trin. 14 Eliz., 3 Dyer 313b, 73 E.R. 711 (also called *Lord Powis's Case)*. The MS of Dyer's reports indicates that the case was decided by all the judges, including Saunders, C.B. and Bacon, L.K. (except Corbett, J.) and was argued in both the Chancery and the Court of Wards. 1 J.H. BAKER, REPORTS FROM THE LOST NOTEBOOKS OF SIR JAMES DYER 35-36 (Selden Soc'y vol. 109, 1994).

Powis's bastard son and who received a remainder in land held in chief. At least two important questions were presented. The first was whether a bastard son could take under the language of a gift which stated "to the son." The second concerned whether a bastard would have to sue livery to take the remainder, a question directly related to the statute. A manuscript report of the case demonstrates that a bastard could be a valid purchaser under the language described and evidently placed considerable weight on the fact that he was "commonly reputed and taken as son of the said Lord Powis."[58] Concerning the second question, the printed version of Dyer's report of the case states "and he shall not sue livery, because he is as a stranger, and not a lawful issue."[59] Therefore, Edward was a son for some purposes (to take the property), but not for others (to sue livery). This language appears to have been sufficient justification for readers to state generally that a bastard was "not within the statute." Nonetheless, there was some later confusion about which of these two separate issues was addressed, and how they were resolved, by this case.

Gray became a popular case to cite for questions concerning the status of bastards, and readings before the case do not consider the advancement of a bastard under the statute. John Popham used the case in 1573 first to examine a disputed son's right to take under a gift, the non-taxation aspect of the case. Discussing a reader's case involving a son born overseas, Popham used *Gray* by way of analogy to examine the difference between a son recognized by the law and a son "according to the common opinion."[60] Supporting his conclusion that the alien son, later made a denizen, may take by a devise of the father to "his son," Popham stated:

> And this is the older [alien-born] son only, and he may well be purchaser by such name, although the law does not count him to be a son in fact, yet he is his son according to the common opinion. And so accepted, it is sufficient for him to

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[58] *Id.*

[59] 73 E.R. 711.

[60] BL MS Hargrave 89, f. 4v.

> make a purchase by such name. As is the case of one, a mere bastard, which was adjudged in the case of Gray bastard son of Lord Powes.[61]

This use of *Gray* was based on the discussion found in the manuscript report, the report addressing the question of whether a bastard may be a purchaser, and was distinct from the applicability of the statute to a gift to a bastard from a parent.

Popham's next use of the case addressed the question of advancement. The applicable part of his reader's case states:

> The disseisee reenters and enfeoffs his bastard son born between him and his wife before the coverture.[62]

The question was whether this feoffment of land held in knight-service in chief to a bastard son constituted an advancement for the purposes of assessing wardship. Finding that it should be considered an advancement within the statute, Popham stated:

> [I]t seems that this bastard is such person as the statute intends, because such a bastard may in cases inherit land as it appears by 20 Assize 6[63] and by Littleton, 96. And such by the spiritual law shall be called a son. And for these reasons, [it is] clearly within the case of the statute. And it appears an even stronger case than [where] one who is a mere bastard is within the case of the statute because such appears by the case now lately adjudged upon the assurance made by the late Lord Powes to his bastard.[64]

Here, although citing *Gray*, it appears that Popham had come to the opposite conclusion of the decision as found in the printed reports of Dyer. Popham's use of canon law is noteworthy. Because under canon law the son would be legitimated by the parents' subsequent marriage, Popham asserted that the transaction was taxable. Thus, this conclusion by Popham and the 1570 discussion quoted at the beginning of this article indicate that the interpretation of the statute was still unsettled.

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[61] *Id.*

[62] BL MS Hargrave 89, f. 16.

[63] BL MS Lansdowne 1133 reads "2 Assize p. 9."

[64] BL MS Hargrave 89, f. 16. A reader's case and discussion involving bastard daughters, but not dealing with advancement, is found at f. 19.

In 1575 another case was decided in the Court of Wards that accorded with the decision of *Madam Woodhouse's Case*. In *Thornton's Case*, a mother during her lifetime gave land held in knight-service to her bastard daughter.[65] Here Saunders, Kingsmill, and Keilwey held that "the Queen shall not have any third part in this case, because she is not a lawful daughter, or child of the mother more than of the father." Dyer, however, doubted this decision.[66] This not only indicates a lingering doubt about the application of the statute to advancements of bastards, but also Dyer's continuing inclusive interpretation of the statutory language.

Although he did not cite *Gray*, Blanchard in 1581 interprets the law to be in accordance with what would later be found in the printed report of the case. A manuscript of Blanchard's reading accurately records the status of a bastard under *Gray* as printed:

> An act executed to a bastard son for his advancement is not an advancement meant by the statute and the king shall not have the wardship of any part.[67]

Nonetheless, by this date *Gray* was just one among many cases which could support this statement, and another manuscript of the reading cites *Madam Woodhouse* for the proposition that an estate executed to a bastard son or daughter is not within the meaning of the statute.[68] For example, it is likely that Blanchard used a case reported by Dyer, as the following entry is found in a list of cases vouched by Blanchard during his reading:

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[65] *Thornton's Case* (1575), Mich. 17 & 18 Eliz., 3 Dyer 345a, 73 E.R. 776.

[66] 73 E.R. 776.

[67] BL MS Add 35951, f. 20v. Two other manuscripts record a reader's case in which the entry of a bastard apparently cut off the right of the lord to wardship. CUL MS Hh.2.1, f. 77v; and St John's College, Cambridge MS 5.28, f. 59v. Another MS notes that an estate executed to a bastard son or daughter is not within the statute. BL MS Add. 16169, f. 262v.

[68] CUL MS Hh.2.1, f. 72.

> A woman has issue, a bastard daughter, and she herself is seised of lands held of the queen in chief. She executes estate of all [her land] to her bastard daughter in fee and dies. And it was adjudged in the Court of Wards that the queen shall not have any part, by the advice of Lord Dyer and Lord Saunders by the report of Lord Dyer [of] 19 Elizabeth.[69]

Professor Baker states that this language suggests that Dyer was orally reporting the case from his own notes. If so, Dyer's view on the subject appears to have shifted towards a more exclusionary reading of the statute. In any event, the passage gives a partial citation to and an accurate reporting of the holding in *Thornton*.

The only manuscript of Robert Gardiner's reading of 1584 indicates that the topic of bastardy was also raised there. Gardiner presented the issue in a reader's case involving a bastard eigne ("older son") and a legitimate younger son, a factual pattern found in many readers' cases. Unfortunately, the argument of the case is not recorded, although the arrangement of the text in the manuscript indicates that the case was argued.[70] As the reader's case involves the bastard eigne disseising the father and the father subsequently releasing all his right to the bastard, one issue clearly raised by the case was the advancement of the bastard during the life of the father.

John Shirley in 1588 also considered the implications of bastardy as it related to an advancement of a child. Although the issue is not explicitly presented in his reader's cases, two records of the argument reveal that it was discussed. The first reference to the topic found is

> [i]f a mother of a bastard conveys land to the bastard, although he be in notice of the world her son, this is not advancement because he is not of "lawful generation."[71]

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[69] BL MS Add. 35951, f. 14v.

[70] LI MS Misc. 367, p. 73.

[71] CUL MS Ee.4.5, f. 49.

Here, Shirley has accurately stated the rule derived from two of the cases presented. The elements of this statement are the mother's conveyance (*Thornton*) and a bastard son publicly known as such (*Gray*).

A second manuscript of the reading also contains a reference to the topic:

> A bastard is not a child within this statute because the words of the statute are "lawful generation."[72]

Thus, even when the reader's case did not expressly raise the issue, readers or those arguing the readers' cases believed that it was an issue worth presenting. The example of Shirley's reading demonstrates the use of *Gray* and its progeny without a citation to the cases. Perhaps by 1588 any sensational quality of the case had died; no one now cared that Edward Gray was the bastard of Lord Powis, and there were now several cases that could be cited for this same principle. Nonetheless, the legal principle was important enough for its inclusion in the readings to continue. The section of the reading which presented this issue sets out fully other advancement issues as well, such as whether a grant benefiting the wife of the son is advancement to the son within the statute.[73] No doubt, when a reader came to read on the provision concerning acts executed during the life of the donor, he and his audience expected to cover the general law surrounding advancement.

For his reading, Hugh Hare appears to have copied substantial portions of Popham's reading without making sure his statements were current. This is the only example of wholesale copying found among the readings on the Statute of Wills. Hare's reliance on Popham's reading got him into difficulty concerning the law of bastardy. Dyer's *Reports* had been published more than six years before the date of Hare's reading, 1592. The basic principle of law on the topic was settled, not only by *Gray* but by later cases and the expositions found in the readings after Popham: Generally, a bastard was not within the language of the statute, although a bastard was sufficient to take as a purchaser under a gift which recited "son." Nonetheless, Hare, copying from Popham's reading, misstated the law:

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[72] BL MS Add. 16169, f. 367v.

[73] CUL MS Ee.4.5, f. 49.

> And this bastard is such son as this statute intends, because such bastard may in cases be inheritable to land. And by the spiritual law shall be called son and thereby clearly within the case of the statute. But if he was a mere bastard who by no possibility may be his heir and of whom the law never takes account as of a stranger, it shall be otherwise than this case is put. The wardship of the heir and of the land shall be given to the king.[74]

This demonstrates further Hare's unquestioning reliance on Popham's reading. It seems an odd mistake for someone about to step into a high position in the Court of Wards.

Augustine Nicholls's reading of 1602 presents the following analysis:

> An estate executed to a bastard is not within the statute. Dyer, 313, 296. But an estate executed to a bastard eigne is within this statute [because] a covenant by natural affection shall raise a use to him. But if a man takes a second wife, the first wife living, and has issue by her, such son is not within the statute and he is a mere bastard.[75]

Here Nicholls has set out the general principle citing *Gray* and the anonymous case decided in 1570 addressing bastardy. His statements continue with the complicating factors of natural affection towards a relative and, it appears, divorce for precontract.

The status of a bastard for the purposes of advancement and the third due to the king is also considered in Henry Sherfield's reading of 1624:

> And lawful children and no others are those who are meant

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[74] BL MS Lansdowne 1141, f. 40.

[75] LI MS Maynard 19(b), f. 5v.

> by the law. And a child by reputation only is not within [the statute] but he must be a child in law and truth. Thus a bastard child although he be of his mother is not a child within the law, because the statute provides for their "lawful generation."[76]

The question arose again later in a reader's case in which a son was arguably made a bastard by divorce for precontract, a factual twist also used by Nicholls:

> Response to the third objection that by the divorce the issue is a bastard, and thus A. is not a child within the law. I have argued to the contrary before and therefore nothing more shall be said on this point. But if it were thus, perhaps this would be a child within the law. As if a man makes a conveyance for the advancement of his wife and after there is a divorce by reason of precontract, this is within the law, because she is a wife by reputation. And if there is a recovery against such husband and wife, shall a divorce afterwards [affect the recovery] according to this act? Certainly not. Relation shall not make a wrong to destroy a settled estate. And Popham holds accordingly as to the wife in his reading upon this statute.
>
> I wish to confess that a bastard is out of this statute, but this is to be understood as such bastard who was both in truth and reputation a bastard always. But as I have argued before [there is] no question that the issue after a divorce by reason of precontract of the husband, whereof the wife knew nothing, shall be always legitimate and shall inherit [from] the mother and the father.[77]

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[76] BL MS Stowe 424, f. 42. The passage continues with related discussion and a citation to *Sir George Curson's Case* (1607), East. 5 Jac. I, 6 Co. Rep. 75b, 77 E.R. 369, discussing advancements to relatives other than children.

[77] BL MS Stowe 424, f. 77v. The passage cites *Leonard Lovies's Case* (1613), East. 11 Jac. 1, 10 Co. Rep. 78a, 77 E.R. 1043, which presents a summary of prior case on this point at 77 E.R. 1049-50 and cites *Curson's Case* among others. Concerning the effect of the divorce, Nicholls was following established canon law. *See* R.H. HELMHOLZ, ROMAN CANON LAW IN REFORMATION ENGLAND 6 (1990). The statute 32 Hen. VIII, c. 38 (1540) on precontracts would have been an important part of the analysis of the fact patterns presented by Nicholls and Sherfield. CLERKE, *supra* note 1, at 79-81; and HELMHOLZ, ROMAN CANON LAW, *supra*, at

Sherfield explores the possibility of a divorce creating a bastard and the effect of this change of status.

The last reading on wills, delivered by Richard Townesend in 1631, also included the factual situation of a bastard in a reader's case. Following this reader's case is a full page of notes addressing the topic of bastards under the statute and a hurried list of phrases and citations. These include citations to *Gray* and *Thornton* which follow the statement, "a bastard is no child within 32 Henry VIII of wills although his mother conveys lands to him."[78]

III. NEW LAW AND POLITICAL POSITIONING

The factual situation of advancing a bastard child provided a frequent topic for readers to present. The interpretation of the statute regarding advancement appears to have been of general importance for the readers, and the question of advancement to bastards presented an interesting legal issue, one of practical importance and with recent case interpretation. It is even possible to speculate as to Dyer's change of mind about the interpretation of the statute. Furthermore, it appears that the cases were sufficiently new and the principles expounded sufficiently important to find their inclusion in many of the manuscripts of the readings.

Readers could use the readings as an opportunity to transmit their interpretation of various statutes for political purposes. The first recorded restrictive interpretation of the statutory provision is found in a reading, Robert Nowell's reading in Gray's Inn in 1561. Despite this anti-revenue position, Nowell was appointed the Attorney of the Court of Wards the same year he read.[79] Nowell's interpretation was then adopted by the Court of Wards seven years later in the decision of *Madam Woodhouse's Case*. This interpretation was repeated in an anonymous case from the Court of Wards in 1570 and again in

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[78] CUL MS Dd.5.51(d), f. 26v.

[79] BELL, *supra* note 4, at 22, n. 4.

Gray's Case in 1572.

One year after the decision in *Gray's Case*, John Popham presented a similar problem in his reading. Nonetheless, Popham argued for a broad application of the statute and cited *Gray's Case* for the opposite rule of law, asserting that a bastard child was within the application of the statute. When Popham read, Dyer's reports, which provided the first printed report of *Gray's Case*, were not to appear for several more years. Manuscripts and reasonable memories could differ in the holding of a case. Popham's argument equates the statutory definition of who is a child with the donor's intent and the donor's characterization of the donee. Because Popham's example dealt with an illegitimate child whose parents later married, this interpretation would also harmonize the definition of legitimacy under the Statute of Wills with the view of the ecclesiastical law. Finally, Popham had been appointed to the Privy Council in 1571, and perhaps this revenue producing interpretation was consistent with his new office.

Question concerning the proper interpretation of the provision lingered into the mid-1570s. Dyer read the provision broadly in 1570 and kept to this interpretation in *Thornton's Case* in 1575. Nonetheless, by 1581 it appears that Dyer had changed his view according to a manuscript of Henry Blanchard's reading. Because Dyer and Blanchard were both members of Middle Temple and both readers on the Statute of Wills, Dyer may have been in attendance at Blanchard's reading.

The only reader after Blanchard to argue for a broader interpretation of the statute was Hugh Hare, who copied Popham's argument. By the time of his reading in 1592, Hare had been joint clerk of the Court of Wards for two years, and this reading of the statute would be consistent with his position.

Thus, for the most part, from 1581 onwards, the law was settled and readers consistently asserted that bastard children were outside the application of the statute. The appearance of Dyer's report of *Gray's Case* in 1585 must have done much to settle any doubts about this exception, Hugh Hare's reading notwithstanding.

In an era when statutes were still viewed as "amending mischiefs," lawyers were beginning to see that statutory language could lead to unintended consequences. The interplay between statute and case law was more complex than the accepted view that statutes adjusted unwanted shifts of the common law. The manuscripts of the readings also indicate the rather fluid way in which case authorities, even after their being set into print, were presented, used, interpreted and misinterpreted. Using a base of statutory texts, the readings provided a critical setting for statutory interpretation within the common law tradition, a setting where legal knowledge could be displayed, shared, and transmitted. Readings not only advanced the political and professional aspirations of the readers, but also served as important bridges between case law and statute, between legal education and legal practice.

UNITED STATES FEDERAL FORFEITURE LAW: CURRENT STATUS AND IMPLICATIONS OF EXPANSION

Marc S. Roy[*]

I. INTRODUCTION

The current use of forfeiture proceedings in the United States to penalize proven or putative wrongdoers is not an historically innovative approach. What is unprecedented, however, is the broadening of the scope of "forfeiture" to inure to the benefit of governmental entities and coffers in matters both civil and criminal. Drug cases and the seizure of assets alleged to be drug-related or financed with drug proceeds provide the most visible forum of activity by the federal government in the forfeiture area of law practice.

This article (a) explores how the policy decisions of the federal government of the United States to pursue forfeiture cases have received varying degrees of approbation by the Supreme Court through the years, (b) examines the effects on law enforcement, and (c) questions whether the permissiveness of federal forfeitures engendered by both statutory and recent case law can be sustained without irreversible loss of

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Constitutional safeguards. With assets measuring in the billions of dollars flowing into federal funds from the course of drug forfeitures and proceedings,[1] and with only the most coarse financial information about similar activities by the respective states, it is at once manifest and concerning that debate on this issue has both legal and economic imperatives. The ultimate resolution may well reflect the competitive melange fostered by these frequently conflicting interests.

II. HISTORICAL BACKGROUND

The laws of early Rome and Greece embodied the concept that when an injury was suffered, an appropriate remedy was to treat the thing, or *res*, as the offender, as well as the cause of the injury itself.[2] Based upon that premise, the forfeiture of such a thing to the injured party has a certain symbolic appeal. If an animal causes the injury, let it be forfeited to the advantage of the person injured and the owner absolved of further punishment. Such an approach was also Biblically sanctioned.[3] The fault of the owner is, therefore, circumscribed into that of the *res* itself. It is not difficult to imagine, however, that a concomitant effect intended even under ancient laws was to prevent further lack of responsibility by the owner of the *res*.

By the time of Blackstone, forfeiture was an established feature of English law.[4] English statutory law allowed forfeiture to the Crown of those objects which were "used in violation of the customs and revenue laws."[5] The common law provided that an inanimate object that effected the death of a person was subject to forfeiture as a "deodand" irrespective of a lack of criminality by the object's owner.[6] Forfeiture thus obtained was supposed to be used for charitable purposes.[7]

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[1] *See* United States v. $12,390.00, 956 F.2d 801, 807 n.6 (8th Cir. 1992) (Beam, J., dissenting) (referring to 1991 Annual Report of the United States Department of Justice, Asset Forfeiture Program). *See also* Terrence G. Reed, *American Forfeiture Law: Property Owners Meet the Prosecutor*, Policy Analysis for CATO Institute, Washington, D.C. (Sept. 29, 1992) <http://www.cato.org/pubs/paspa-179es.html>. Reed also serves as the chairman of the America Bar Association's Committee on RICO, Forfeiture, and Civil Remedies.

[2] *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 34 (1881).

[3] *See Exodus* 21:28. *See also* United States v. Bajakajian, 84 F.3d 334 (9th Cir. 1996).

[4] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 297 (9th ed. 1978); Vol. 2, at 267; Vol. 4, at 381-89.

[5] Austin v. United States, 509 U.S. 602, 612 (1993) (quoting Calero-Toledo v.

In cases of treason or felony, however, the criminal culpability of the owner attached to his property and could result in its forfeiture to the Crown.[8] Conviction upon these charges could result in forfeiture of real property for the period of the wrongdoer's life or, as a result of "corrupt blood," in perpetuity against any benefit to his estate or heirs.[9] The prospect of forfeiture aided the demands of the Crown for obeisance of its subjects and, not incidentally, served as a revenue-raising device.[10] As a practical matter, the transfer of personalty from the accused, prior to his conviction, to a *bona fide* third party for value was excused from the operation of English forfeiture.[11]

Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974)).

[6] BLACKSTONE, *supra* note 4, Vol. 1, at 300. Deodand is a gift to be given to God through the medium of the Church as an "expiation for the souls or such as were snatched away by sudden death." *Id.*

[7] *Id. But cf.* James Maxeiner, *Bane of American Forfeiture Law—Banished at Last?,* 62 CORNELL L. REV. 768, 771-72 (1977) (arguing that forfeiture/deodand connection is less apparent).

[8] *See* BLACKSTONE, *supra* note 4, Vol. 4 at 387-88; *see also* 3 W.S. HOLDSWORTH, HISTORY OF ENGLISH LAW 68-70 (3d ed. 1923).

[9] *See, e.g.,* Calero-Toledo v. Pearson Yacht Co., 416 U.S. 663, 682 (1974); 1 Stat. 117, ch. 9 (1790); Lawrence J. Casella, *Corruption of Blood, Sovereign Forfeiture, and Property* (1997) <http.//fear.org/corrup.html>; BLACKSTONE, *supra* note 4, Vol. 4 at 388-89.

[10] *See* BLACKSTONE *supra*, note 4, Vol. 1 at 302 (stating that the King's use of deodands and forfeits was "perversion of their original design"); *see also* S. Kessler, *Crime and Punishment . . . and Punishment: Civil Forfeiture and the Double Jeopardy Clause* 2 (May 26, 1996) (on file with the author and the *Mississippi Law Journal*).

[11] *See* BLACKSTONE *supra* note 4, Vol.4 at 387-88. This exception presaged the development of the modern "innocent owner" defense to forfeiture and its corollary argument that ownership of the *res* sought to be forfeited "relates back" to the time of the crime. *Id.* at 387. The government's need to adduce proof of an object's relationship to prohibited activity is considerably lessened if ownership of the *res* is deemed to be in the government at the time that such activity occurs without the necessity of proving some use of the *res* by subsequent, perhaps "straw man," owners. *Id.*

Any statutory felony under English law allowed for the application of the corruption of blood doctrine, unless otherwise provided.[12] Therefore, a taking of a person's property for a crime results in an action against his descendants as well, with the result that the ancient doctrine of corruption of blood remains active today.[13]

The application of forfeiture was not limited to felony proceedings under English law, but extended to the Court of Exchequer and the Admiralty Court jurisdiction as well.[14] Also the *in rem* jurisdiction of English forfeiture laws was subject to colonial courts' enforcement "long before the adoption of the Constitution."[15] Unlike their English brethren, American colonists were generally able to avail themselves of the right to trial by jury in forfeiture actions.[16] The fact that their courts regularly heard forfeiture actions that benefitted the British did not endear the concept of forfeiture to the American colonials.[17] The adoption of express safeguards in 1787 by the Framers of the United States Constitution in Article III, Section 3[18] reflects the serious concerns of the emerging nation with prior forfeiture laws and their application.

The reticence of the Framers to endorse forfeiture has not been shared by succeeding federal Congresses and administrations. There are now over 350 statutory forfeitures permitted under Federal law.[19] Subject to the provisions of their own respective constitutions and to the strictures of the Federal Constitution, the various states have increasingly relied upon forfeiture actions to supplement their own treasuries.[20] Whether the Federal courts have now come full circle in allowing actions couched in the rubric of forfeiture to displace the restraint of the constitutional draftsmen and to reinstate the perceived excesses of the earlier forfeiture systems is now at issue.

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[12] *See* Casella, *supra* note 9.

[13] *Id.* (observing that "[t]he eye-rolling jurists of today endorse the results of corruption of blood in every respect except calling it what it really is").

[14] *See* C.J. Hendry Co. v. Moore, 318 U.S. 133, 137 (1943).

[15] Austin v. United States, 509 U.S. 602, 613 (1993) (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974)); *accord C.J. Hendry Co.*, 318 U.S. at 137.

[16] *See* People v. One 1941 Chevrolet Coupe, 231 P.2d 832, 842 (Cal. 1951).

[17] *See* Reed, *supra* note 1 (referring to John Adams' defense of John Hancock and his ship in forfeiture action for failure to pay customs duties as abetting colonial desire to part with British authority).

[18] U.S. CONST. art. III, § 3 (stating that "Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted"). *See* U.S. CONST. amend. V (stating "[n]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb"). *See* Casella, *supra* note 9; Patricia V. Canavan, Comment, *Civil Forfeiture of Real Property: The Government's Weapon Against Drug Traffickers Injures Innocent Owners*, 10 PACE L. REV. 485, 489 (1990).

III. *IN REM* OR *IN PERSONAM*: 1776-1996

The concept of an *in rem* forfeiture action is the classic embodiment of a legal fiction.[21] To continue the ancient ascription of fault to an object, the *res*, and not necessarily to the owner of the *res*, twists modern theories of tort liability, based upon personal fault,[22] and criminal responsibility, based upon intent.[23]

Who can seriously fail to recognize that what is really on trial in a forfeiture action is the right of the owner of an object to his continued rights of ownership,[24] and concomitantly the ability of the government to penalize, not the object, but rather its owner(s)?[25] Forfeiture statutes invariably account for the "*in personam*" effects of *in rem* actions by providing for notice (albeit to also satisfy requirements of the Due Process Clause), to be given both to the record owner and to the person in possession of the *res* sought to be forfeited.

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[19] This figure includes civil and criminal forfeitures, as of August 1998.

[20] See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda,* 65 U. CHI. L. REV. 35, 35-114 (1998) for a general discussion of the economic motivations behind various states' forfeiture laws.

[21] *See* George C. Pratt & William B. Peterson, *Civil Forfeiture in the Second Circuit,* 65 ST. JOHN'S L. REV. 653 (1991).

[22] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984) (defining "fault" as failure to meet societal standards).

[23] *See* MODEL PENAL CODE, § 2.02(2) (1985) (listing general requirement of mens rea).

[24] *See* United States v. Ursery, 518 U.S. 267, 297-321 (1996) (Stevens, J., dissenting).

[25] Even if the "relation-back" doctrine is employed, it is necessary only to substitute "alleged" or "putative" owner at the time of the act for which forfeiture is sought for one to realize it is the actual person to whom the forfeiture is directed.

In 1827, in *The Palmyra*, the *in rem* distinction was applied by the Supreme Court to allow the forfeiture of a ship to the federal government despite the failure of the government to obtain a conviction on the underlying criminal charges of piracy against the ship's owner.[26] Almost 100 years later, in *J.W. Goldsmith Jr. Grant Co. v. United States*, the Supreme Court refused to hold that an otherwise innocent owner could not be deprived of his property.[27] The Court's reasoning, as in *The Palmyra*, was that it is the thing itself, and not the owner or his actions, that is the issue of a forfeiture action.[28] The civil, and therefore *in rem*, nature of actions to forfeit property was reinforced by the Court's holding in *Various Items of Personal Property v. United States*[29]: "It is the property which is proceeded against, and, by resort to a legal fiction, held guilty."[30]

In the 1972 case of *One Lot Emerald Cut Stones v. United States*,[31] a jewelry dealer had been acquitted of smuggling charges[32] prior to the commencement of forfeiture by the United States against the previously seized lot of emeralds and a ring.[33] Granting *certiorari*, the Supreme Court held, *inter alia*, that since the acquittal below might have been based upon a lack of criminal intent, an element of proof not required in forfeiture proceedings as a civil matter, the owner's argument that collateral estoppel acted as a bar to the subsequent forfeiture failed.[34] The fictional distinction between *in rem* civil actions and *in personam* criminal case jurisdiction, although phrased as a matter of proof,[35] remained thus intact.

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[26] *See The Palmyra*, 25 U.S. (12 Wheat) 1, 14-18 (1827).

[27] *See* J.W. Goldsmith Jr. Grant Co. v. United States, 254 U.S. 505, 506-07 (1921).

[28] *Id.* at 507.

[29] 282 U.S. 577 (1931).

[30] *Various Items of Personal Property*, 282 U.S at 581.

[31] 409 U.S. 232 (1972).

[32] *One Lot Emerald Cut Stones*, 409 U.S. at 232-33 (citing 18 U.S.C. § 545 (Supp. 1999)).

[33] *Id.* (citing 19 U.S.C. § 1497 (1999)).

Federal forfeiture statutes have been and remain based upon this *in rem* concept of property.[36] At present, this statutory approach by the federal government seems secure following the *per curiam* opinion in *United States v. Ursery.*[37] Before it could rule upon the central issue of whether civil forfeitures are punishment, and therefore subject to the Double Jeopardy Clause, the Court in *Ursery* had to first decide upon what basis an action could be classified as "civil" or *in rem.*[38] Quoting with approval the earlier definition of a legal fiction by Justice Sutherland,[39] The Court further opined that "the constitutionality of forfeiture statutes thought constitutional for over a century"[40] was not prohibited by the earlier decision in *Various Items of Personal Property.*[41] The *Ursery* Court thus accepted the traditional characterization of a forfeiture action as a civil *in rem* proceeding.[42]

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[34] *Id.* at 234.

[35] *Id.* at 234-35.

[36] *See, e.g.*, Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-971 (1999); Crime Control Act of 1984, 21 U.S.C. § 881 (1999); Anti-Drug Abuse Act of 1986; Omnibus Crime Act of 1994. *See also* 23 U.S.C. § 159 (Supp. 1999) (mandating that drivers' licenses are to be taken, upon criminal conviction of holder for offenses, in order for respective states to receive continuing federal highway funds). This provision, as implemented by the different states, has prompted defense counsel to argue for the application of double-jeopardy provisions in license-revocation hearings with varying degrees of success depending upon the jurisdiction. *See* U.S. DEPARTMENT OF JUSTICE—THE DRUG AGENTS' GUIDE TO FORFEITURE OF ASSETS (1987), at 30.

[37] 518 U.S. 267 (1996).

[38] *Ursery*, 518 U.S. at 274-78.

[39] *Id.* at 275 (quoting Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931)).

[40] *Id.* at 276.

[41] *Id.*

[42] *Id.* at 277 (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362-64 (1984)). *See also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 684 (1974).

IV. THE OTHER FICTION OF "RELATION-BACK" AND ITS IMPACT ON INNOCENT OWNERS

The *in rem* characterization is not the only legal fiction of assistance to the United States government in effecting forfeitures. It is ably abetted by imposition of the "relation-back" doctrine. In the nineteenth-century case of *United States v. Stowell*,[43] the Supreme Court held that, irrespective of the record ownership of the property at the time of the commencement of a forfeiture action, forfeiture was deemed to have occurred as of the time of the wrongful act.[44] The significance of this holding was not only in the summary, retrospective divestiture of property from a record owner or person in possession, but also in its assertion that forfeiture would act to divest intermediate purchasers or transferees of interests acquired after the occurrence of the wrongful act.[45]

A. *No Notice to Subsequent Transferees of Property*

Since the United States instantly becomes the owner of the property at the time a proscribed act occurs, later transfers by the record or apparent owner would be nullified by the operating principle of *nemo dat quod non habet*. The problem engendered by the application of such a principle in areas already subject to legislation is one of notice. The disruptive effect of property transfers outside the record chain of title, such as unrecorded transfers to the federal government without notice of such transaction being afforded even to the putative grantor of such transfer, runs counter to common state attempts to protect the finality of real property transactions under "notice" or "race-notice" statutes.[46]

The difficulties faced by persons with title acquired after the wrongful act that supports a forfeiture, but before judgment of forfeiture is entered of record, were presaged by a dissenting opinion of Justice Story in which he excoriated the doctrine of relation-back for placing a person in the position wherein "no amount of caution or diligence" is sufficient to protect oneself from "injury and perhaps ruin."[47] More recently, case law has borne out the verisimilitude of Justice Story's opinion.[48]

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[43] 133 U.S. 1 (1890).

[44] *Stowell*, 133 U.S. at 16.

[45] *Id.* at 16-20.

[46] A "notice" statute requires some notice, such as lis pendens filing, for valid transfer of property. A "race-notice" statute requires filing of deed, without notice of prior transfer, to complete property transfer.

B. United States v. 92 Buena Vista Avenue—*A Step Forward for Property Owners*

Congressional response to the injustices of the relation-back doctrine has been slow, but has resulted in codification of certain "innocent-owner" exemptions to forfeiture.[49] Even though the protection of innocent owners was fortified by acts of Congress, the United States Department of Justice has maintained that where property is otherwise subject to the application of the relation-back doctrine, subsequent purchasers and transferees of the property are left with no rights entitled to protection.[50] The success of this argument was limited by *United States v. 92 Buena Vista Avenue.*[51]

In *92 Buena Vista Avenue*, the former paramour of an alleged drug-dealer found her New Jersey home seized by the United States Marshal's Service on the basis that most of the $240,000 purchase price had been paid out of the proceeds of drug-dealing.[52] Reversing the district court, the Third Circuit held that an "innocent owner" can include a donee and is not limited to a *bona fide* purchaser for value.[53] The court further held that the government could not rely upon the relation-back doctrine to summarily defeat an innocent-owner defense to a forfeiture.[54]

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[47] United States v. 1960 Bags of Coffee, 12 U.S. (Cranch) 398, 406 (1814) (Story, J., dissenting).

[48] *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623 (1989) (stating that relation-back may defeat attorneys fees); *see also* 18 U.S.C. § 1963(c) (1994) (codifying relation-back doctrine); 21 U.S.C. § 853 (1994) (mandating criminal forfeiture for use of controlled substances, including continuing criminal enterprises).

[49] See, for example, the Anti-Drug Abuse Act of 1988, Pub.L. 100-690, 102 Stat. 418, and, in particular, the innocent-owner provisions of 21 U.S.C. § 881(a)(4)(C), (a)(6) (1994), for certain legislative exemptions.

[50] *See* Reed, *supra* note 1.

[51] 507 U.S. 111, 129 (1993) (plurality opinion).

[52] *92 Buena Vista Ave.*, 507 U.S. at 115.

This decision by the Third Circuit created a schism between it and other appellate courts.[55] Granting *certiorari* in *92 Buena Vista Avenue*,[56] the Supreme Court held that the relation-back doctrine does not extinguish the rights of third parties acquiring an interest in property after the illegal act occurs for which forfeiture is sought and does not bar the presentation of an innocent-owner defense against the forfeiture.[57] This ruling is consistent with the intent of Congress expressed by the statutory recognition of the innocent-owner defense.[58] Had the Court decided otherwise, the innocent-owner defense as approved by Congress would have been rendered virtually meaningless.[59]

What then is the effect of the relation-back doctrine to the civil forfeiture of property following *92 Buena Vista Avenue*?

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[53] United States v. 92 Buena Vista Ave., 937 F.2d 98, 101-02 (3d Cir. 1991).

[54] *Id.* at 102.

[55] In *One 1985 Nissan*, 889 F.2d 1317, 1321 (4th Cir. 1989) and *Eggleston v. Colorado*, 873 F.2d 242, 247 (10th Cir. 1989), *cert. denied sub nom.*, *Colorado Department of Revenue v. United States*, 110 S. Ct. 1112 (1990), the Fourth and Tenth Circuits each upheld the immediate transfer of property to the United States upon the occurrence of a wrongful act as precluding any rights by later purchasers or transferees to claim ownership, whether innocent or otherwise, as a defense against the United States in a forfeiture action. The incongruity of these holdings with the Third Circuit's opinion in *92 Buena Vista Avenue* rendered the matter ripe for a grant of *certiorari* by the Supreme Court.

[56] *92 Buena Vista Ave.*, 507 U.S. at 118.

[57] *Id.* at 129.

[58] *See* 21 U.S.C. § 881.

[59] *See* Sharon Fila, *Innocent Owner Defense to Government Seizure of Real Property Purchased with Drug Proceeds Under Drug Forfeiture Laws:* United States v. 92 Buena Vista Ave. (1997) <http.//www.fear.org/fila.html>. Fila quoted the observation of David F.B. Smith that "most innocent owners are likely to have acquired their property interests subsequent to the date of the illegal activity." *Id.* (quoting "High Court Rejects Relation-Back Cutoff for Innocent Owner Rights," *Title News*, Mar.-Apr. 1993, at 9). This statement represents the tautology that is relation-back: By the time someone acquires a property interest, it is not possible to acquire a property interest since the government already owns the property.

According to the plurality opinion in *92 Buena Vista Avenue*, the legal fiction of relation-back is operable only after a forfeiture is judicially approved.[60] Even though *92 Buena Vista Avenue* required the Court to reconcile the statutory provision for an innocent-owner defense[61] with a concomitant one allowing for imposition of the relation-back doctrine,[62] the opinion anticipated that no different result would attend a situation where no relation-back statute was involved.[63]

The result after *92 Buena Vista Avenue* is that the relation-back doctrine continues to apply in civil forfeiture cases, but only after judicial consideration of an innocent-owner defense, if one is offered.[64] If the United States succeeds in its claim that the property should be forfeited to it, then the relation-back doctrine enables the government to assert title retrospectively to the property and to the benefits accruing to such ownership as of the time the wrongful act occurred.[65]

92 Buena Vista Avenue represents a step forward for the interests of property owners faced with the prospect of a civil forfeiture. The gain thus obtained is modest, however, when the governmental policy of determining just who is an innocent owner is reviewed. Whether or not an owner is "innocent," at least within the construct of civil forfeiture, is not within the ambit of innocence presumed, at least theoretically, of a criminal defendant.[66] A property owner, asserting an innocent-owner defense, does not have the benefit of constitutional protections as he would if charged as a criminal defendant.[67]

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[60] *92 Buena Vista Ave.*, 507 U.S. at 129.

[61] *See* 21 U.S.C. § 881(a)(6).

[62] *See* 21 U.S.C. § 881(h).

[63] *See 92 Buena Vista Ave.*, 507 U.S. at 129; Fila, *supra* note 59, at 12-14.

[64] *92 Buena Vista Ave.*, 507 U.S. at 129.

[65] *See id.* (noting that decision "denies Government no benefits of the relation-back doctrine").

[66] *See* Blumenson & Nilsen, *supra* note 20, at 5 & nn.53-54; Smith, PROSECUTION AND DEFENSE FORFEITURE CASES (June 1977 ed.), § 11.03.

[67] *See* Reed, *supra* note 1.

C. *Innocent Owners—A Heavy Burden*

The property owner may also find himself treated virtually as an interloper, since it is the fictional culpability of the property itself that is ostensibly at issue in the forfeiture proceeding.[68] The interjection of the innocent-owner defense puts the property owner, his mental awareness, and ultimately his culpability on trial, but without the usual panoply of rights and tactics available to a criminal defendant.

More difficult still is the situation where a property owner, facing civil forfeiture, is also charged separately with a crime. A person in this predicament may find that the civil forfeiture case is called for trial prior to any disposition of the criminal matter. Complicating matters further, the forfeiture may be brought in a state court jurisdiction while the criminal charge is being prosecuted on the federal level, or *vice versa*.

The assault on the property owner/defendant may thus be mounted on two fronts, each mandating separate and potentially prohibitive sets of costs and attorneys' fees. The property owner/defendant has to weigh then, by a highly subjective cost/benefit analysis of his own devising, the potential adverse consequences of proceeding to assert an innocent-owner defense in the forfeiture action prior to the end of the criminal case.[69]

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[68] Because of the relation-back doctrine and shifting of the burden of proof, the property owner has to interrupt the possession and presumed ownership by the United States. *See* United States v. 1982 Chevrolet Corvette, 976 F.2d 392, 392-93 (8th Cir. 1992) (holding that in forfeiture proceedings, after government establishes probable cause that property was used for unlawful purpose, burden shifts to party opposing forfeiture to demonstrate by preponderance of evidence that property is not subject to forfeiture); J.W. Goldsmith, Jr. Grant Co. v. United States, 254 U.S. 505, 513 (1921) (asserting that owner's innocence is irrelevant since property is on trial).

[69] In particular, an exercise of the Fifth Amendment in the forfeiture proceeding does not necessarily receive the level of constitutional protection, and in practice, is often ignored by trial judges as is available in purely criminal proceedings. A property owner who also faces criminal charges and elects to testify at a forfeiture hearing may find himself convicted subsequently of criminal charges at least partly based upon his civil forfeiture trial testimony. Another possible scenario is that he is or is not convicted of the related criminal matter, but nonetheless remains subject to perjury charges for evidence given at the civil forfeiture

If a property owner then decides to present an innocent-owner defense, at issue will be whether or not he knew of the illegal use of the property at the time his interest in it was obtained.[70] The government, in seeking forfeitures of drug-related property, has a legitimate skepticism about the transfer of property from a drug dealer or suspect to close friends and family members. Not infrequently, real property, jewelry, vehicles and other forms of personalty are placed in the care of associates and relations of drug traffickers. This entrustment of property may include instructions that ownership be asserted by these persons only in the event of the arrest or incarceration of the initial or record owner.[71]

Because of the need to guard against these types of transactions, an innocent claimant can expect the government to make full use of the discovery devices permitted by civil procedure rules. Due to the intense personal interest by some law enforcement personnel to inflict loss on a particular person or to obtain a certain property resource, innocent-owner claimants often find that they are subjected to proving more than their mere lack of knowledge of the property's illegal use. The resulting standard of proof required of a property owner has been termed one of "super-innocence."[72]

D. The Government—What Burden?

The burden required of the United States in a civil drug forfeiture proceeding is first to establish that probable cause exists that the property was used in or connected to illegal drug activity.[73] Anyone who has ever obtained or granted

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hearing and still loses his property.

[70] *See* Reed, *supra* note 1, at 8.

[71] These methods of sheltering assets by placing them "in trust" with those who may later be indicted as co-conspirators carry the obvious risk that the "trustee" may abscond with or may retain the property irrespective of the owner's ultimate fate at the hands of law enforcement. Interestingly, criminal law practitioners can find themselves approached by clients seeking justice and the assistance of the legal system to recover property lost by these sham transactions. Self-help remedies by individuals so aggrieved are certainly not novel either.

[72] *See* Reed, *supra* note 1.

[73] *See* 19 U.S.C. § 1615 (1994) (requiring probable cause to be shown by gov-

search warrants, or who has attempted to question the proof required of law enforcement for the issuance of a warrant, will realize the paucity of evidence required to support a finding of probable cause. The property owner has the burden shifted upon him to prove by the civil standard of the preponderance of the evidence that the property is exempt from seizure.[74] Failing this showing by the owner, the government, quite simply, wins.

Prior to the statutory enactment of the innocent-owner defense, an owner could request forfeiture remission or mitigation from the United States through its agent, the Justice Department.[75] Rarely granted, the situation remains much the same today.[76] Technically available as an avenue to contest a federal forfeiture, the virtually unlimited discretion afforded the Justice Department in determining whether or not to grant a petition for remission or mitigation affords a petitioner little hope for relief.[77]

This procedure is a one-sided affair, with detailed information regarding the circumstances of ownership being required from the petitioner, but only a summary description of the seized property and a notice that the same is to be forfeited being furnished to the petitioner in return. The process,

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ernment); *see also* DRUG AGENTS' GUIDE, *supra* note 36, at 9.

[74] *See, e.g.,* United States v. $121,000 in U.S. Currency, 999 F.2d 1503, 1505 (11th Cir. 1993) (holding that claimant must prove by preponderance of evidence either that property was not used unlawfully or that illegal use was without claimant's knowledge or consent); United States v. 101 Kimberly Ave., 765 F. Supp. 39, 42 (D. Conn. 1991) (same). Note also that a similar showing is required in a criminal in personam forfeiture by a third party claiming an interest in the property. *See* 21 U.S.C. § 853(n)(6) (1999).

[75] *See* Reed, *supra* note 1.

[76] *See id.; see also, Federal Seizure of Illegal Assets Nets Government $1.5 Billion Since 1985,* U.S. LAW WEEK (Feb. 4, 1991) (reciting figures indicating that less than three percent of seized assets returned to claimants).

[77] The inherent lack of a disinterested adjudicator within the process contributes to the "stacking of the deck" against the petitioner claiming relief. It is hardly reasonable to presume that the Justice Department, as an agency responsible for both law enforcement and for prosecutions on behalf of the activities of its law enforcement officers, will be overly enthusiastic about returning property seized by those officers.

though strict in its timetabling demands upon the petitioner, does not place similar limits upon the time that may be required by the Justice Department to issue a decision.

While the petition for relief winds its seemingly interminable way through the Justice Department system, a petitioner is thus denied access to money or other property entangled by this procedure, regardless of the eventual outcome.[78] The low standard required of the government to obtain civil forfeiture, coupled with the costs a property owner must endure in seeking either judicial or administrative forfeiture relief,[79] certainly contributes to a negative impetus for the presentation of an innocent-owner defense at least in forfeitures embracing relatively small values.

V. THE DOUBLE JEOPARDY ARGUMENT AND FORFEITURE

If property owners may be doubtful of proving their innocence and of recovering their seized property under the auspices of the innocent-owner defense, what further dilemma may be countenanced by the property owner who is also embroiled in the defense of criminal charges?

The most actively pursued area of defense for property owners in this predicament has in recent years included efforts to incorporate the protection of the Double Jeopardy Clause[80] to forfeitures. The basic premise that no one should be punished more than once (*nemo debet bis puniri pro uno delicto*)[81] has caused property owners to seek shelter from forfeiture under the umbrage of double jeopardy in a variety of situations.[82]

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[78] Law enforcement officers will often admit that this is the minimal result hoped for under this system. If the claimant suffers the loss of his funds or other property permanently, so much the better. At the very least, the claimant is put to the inconvenience of paying to fight for his property or, alternatively, is prevented from accessing funds which he might otherwise use for his legal defense in other areas.

[79] In fact, the property claimant must post a cost bond to preserve his right to contest the forfeiture by the government. *See* 19 U.S.C. § 1608 (1988). The claimant has no current right of reimbursement of attorneys' fees or costs, even if he is successful in contesting the forfeiture.

[80] U.S. CONST. amend. V.

[81] *See* Kessler, *supra* note 10 (referring to observations by Sir Edward Coke); *see also* MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 5 (1969) (regarding similar

A. One Lot Emerald Cut Stones v. United States

Over a quarter-century ago, the Supreme Court held that a civil forfeiture of goods subsequent to an acquittal of underlying criminal charges for smuggling is not violative of the Double Jeopardy Clause.[83] The reasoning of the *per curiam* opinion in *One Lot Emerald Cut Stones* included recognition of the right of Congress to impose "both a criminal and a civil sanction in respect to the same act or omission, for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense."[84]

The Court in *One Lot Emerald Cut Stones* emphasized the fact that the forfeiture provision was statutorily separate from the smuggling charge.[85] The elements of the criminal offense included the same factors that were to substantiate the civil forfeiture,[86] yet the Court focused, in the Double Jeopardy portion of its opinion, upon the statutory dichotomy which allowed for both civil and criminal proceedings.[87] The Court declined to rule upon whether or not the criminal acquittal would preclude a forfeiture under the criminal statute itself.[88]

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argument, made by Archbishop Thomas á Becket, that the King should not try again those already convicted in ecclesiastical courts).

[82] *See, e.g.*, United States v. Ursery, 518 U.S. 267, 271 (1996) (involving house and business forfeited after drug conviction); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 356 (1984) (concerning shotguns forfeited after acquittal of licensing violation); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 233 (1972) (involving imported merchandise forfeited for customs violation after criminal acquittal).

[83] One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235-36 (1972).

[84] *One Lot Emerald Cut Stones*, 409 U.S. at 235-236 (quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1938)).

[85] *Id.* at 234-35.

[86] *Id.* at 235-36 (citing 19 U.S.C. § 1497 (1999)).

[87] *Id.* (citing 19 U.S.C. § 545 (1999)).

[88] *Id.* at 236 n.6.

According to the *One Lot Emerald Cut Stones* opinion, determination of whether a statute is either criminal or civil is a matter of interpretation.[89] This pithy pronouncement is of little assistance in practical litigation since the same statement can be made about virtually any area of litigation. What little guidance exists from *One Lot Emerald Cut Stones* may be surmised from the Court's conclusion that the civil forfeiture provision in question was remedial since the provision served both to repay the investigative expenses incurred by the United States and to operate as "a reasonable form of liquidated damages" against the property owner.[90]

Although *One Lot Emerald Cut Stones* has been cited with approval in more recent cases concerned with double jeopardy,[91] the question of whether, and to what extent, the Double Jeopardy Clause applies in civil forfeitures continues to be raised.

B. United States v. One Assortment of 89 Firearms

In *United States v. One Assortment of 89 Firearms*,[92] the Supreme Court again considered whether a criminal acquittal acted as a bar to a later forfeiture. The owner of a number of firearms was acquitted of the criminal charge of dealing without a license.[93] Forfeiture of the firearms was upheld, however, on the basis that removing dangerous or illegal objects was remedial in nature.[94] The Court in its analysis promulgated a two-part test for determining whether a forfeiture is criminal or civil.[95] First, Congressional intent is to be considered in determining whether the forfeiture is remedial and civil or whether it is to operate as a criminal punishment.[96] Second, the forfeiture is to be evaluated to determine whether, despite being intended as remedial, the effect is so punitive as to amount to a criminal punishment.[97]

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[89] *Id.* at 237.

[90] *Id.*

[91] *See, e.g.,* United States v. Ursery, 518 U.S. 267, 276 (1996) (asserting that *in rem* civil forfeitures for drug-dealing and money-laundering are not same as criminal punishments and, therefore, not covered by Double Jeopardy Clause); Dowling v. United States, 493 U.S. 342, 349 (1990) (stating that there is no double jeopardy violation where evidence of acquitted crime was referred to in later trial of additional criminal charge); Breed v. Jones, 421 U.S. 519, 528 (1975) (holding double jeopardy concern of Fifth Amendment does not exist in civil actions).

[92] 465 U.S. 354 (1984).

[93] *One Assortment of 89 Firearms*, 465 U.S. at 356.

[94] *Id.* at 362-66.

As in *One Lot Emerald Cut Stones*, the Court in *One Assortment of 89 Firearms* concluded that the forfeiture in question was remedial and, therefore, not barred by the Double Jeopardy Clause.[98] Once more great significance was placed by the Court on the United States' statutory filing of the forfeiture as a civil lawsuit.[99] Under the first part of the test used in *One Assortment of 89 Firearms*, a finding under the first part that a forfeiture is intended as remedial virtually predetermines the status of the forfeiture as a civil sanction. This interpretation of *One Assortment of 89 Firearms* is supportable when one considers that the second part of the test requires "the clearest proof"[100] by a property owner that the forfeiture is criminally punitive as applied. In consequence, the property owner has to disprove the intent of Congress, which has already been found acceptable to the Court under the first part of the two-part test. Thus, the burden is on the owner to meet a high level of proof, one that is usually reserved for fraud-type cases, to retain his property.

The owner contesting a forfeiture on the basis that it is criminally punitive as applied thus faces a most onerous burden of proof. The policy rationale of supporting law enforcement activities has led to *One Lot Emerald Cut Stones* and *One Assortment of 89 Firearms* being described as "results oriented"[101] decision making by the Supreme Court.

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[95] *Id.* at 362-63.
[96] *Id.* at 362.
[97] *Id.* at 362-63.
[98] *One Assortment of 89 Firearms*, 465 U.S. at 366.
[99] *Id.* at 363.
[100] *Id.* at 365 (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960)).
[101] Kessler, *supra* note 10.

C. United States v. Halper *and* United States v. Austin

New hope for property owners seeking protection under the Constitution against forfeitures appeared on the horizon in the cases of *United States v. Halper*[102] and *Austin v. United States.*[103]

In *Halper*, a criminal defendant was convicted of overcharging the United States by purposefully inflating Medicare claim forms.[104] The amount of the criminal fine was only a fraction of the amount of the judgment obtained against Halper by the United States in the civil forfeiture.[105] The Supreme Court upheld a reduction of the award to the government by the District Court on the ground that the full forfeiture amount was an impermissible second punishment under the Double Jeopardy Clause.[106] The Court decided that the gross disproportionality of the forfeiture when compared against the actual damages of the United States brought the particular situation of *Halper* out of the remedial Congressional intent of the forfeiture statute.[107]

The *Austin* case involved the civil forfeiture of a mobile home and automobile repair shop.[108] Austin entered a plea of guilty to a criminal charge of possession with intent to distribute a controlled substance before the United States commenced the forfeiture as a civil cause of action.[109] Unlike the double jeopardy appeal made in *Halper*, the argument advanced in *Austin* against the forfeiture was that the Eighth Amendment's Excessive Fines Clause[110] is applicable to civil forfeitures.[111] Therefore, the state court's acceptance of the guilty plea and the imposition of sentence precluded a subsequent forfeiture action in that or any other court. Although rejected by both the district court and the court of appeals, the Supreme Court reasoned that, although the forfeiture statutes in *Austin* might serve remedial purposes, they might have the further function of inflicting punishment.[112] If so, the Excessive Fines Clause of the Eighth Amendment was not precluded from applying.[113]

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[102] 490 U.S. 435 (1989).

[103] 509 U.S. 602 (1993).

[104] *Halper*, 490 U.S. at 437. Halper received a fine of $5,000 and a prison sentence of two years for defrauding the United States of nine dollars on each of sixty-five Medicare invoices under 18 U.S.C. § 287 and related mail-fraud counts. *Id.*

[105] *Id.* at 438. The forfeiture was brought pursuant to 18 U.S.C. § 3729 (1982), resulting in an award of more than $130,000.00 in favor of the United States, such amount being a monumental award above that of the criminal penalty. *Id.*

[106] *Id.* at 452.

[107] *Id.* at 448-52. The district court observed that the forfeiture was 220 times greater than any measurable remedial purpose of the government. *Id.* at 439.

[108] *Austin*, 509 U.S. at 604-05. *See also* 21 U.S.C. § 881(a) (1997) (stating that items used or intended to be used in illegal drug transactions are subject to forfeiture).

[109] *Austin*, 509 U.S. at 604.

Recognizing that forfeiture historically included the function of punishment both in England and the United States at the time of the adoption of the Constitution,[114] Justice Blackmun determined that indeed the forfeiture in *Austin* was punishment for purposes of applying the Excessive Fines Clause.[115] The Court limited its review, but not its historical inquiry, to the instant forfeiture statutes.[116] For this reason, the opinion is instructive of the potential Eighth Amendment limits of forfeitures more generally. Similarly, *obiter dicta* regarding the applicability of the Eighth Amendment Excessive Fines Clause was not confined in *Austin* to civil *in rem* forfeitures.[117]

D. Alexander v. United States

Alexander v. United States,[118] decided the same day as *Austin*, seemingly confirmed the less deferential treatment of forfeiture actions brought by the United States. In an opinion by Chief Justice Rehnquist, the Court held that the Excessive Fines Clause clearly applied to a consideration of whether monetary punishments sought by the government in *in personam* criminal forfeiture actions were in fact "excessive."[119]

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[110] U.S. CONST. amend. VIII (providing that "excessive bail shall not be required, nor excessive fines imposed").

[111] *Austin*, 509 U.S. at 605.

[112] *Id.* at 621-22.

[113] *Id.* at 622.

[114] *Id.* at 611-18 (citing Peisch v. Ware, 4 Cranch 347, 364 (1808)).

[115] *Austin*, 509 U.S. at 621-22.

[116] *Id.*

[117] *Id.* at 609-10 (noting that "[t]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense'").

[118] 509 U.S. 544 (1993).

Since *Alexander* involved an *in personam* criminal forfeiture, rather than an *in rem* civil forfeiture as in *Austin*, there was no need for the Court to consider the "threshold question concerning the applicability of the Eighth Amendment."[120] Although the Supreme Court acknowledged the extensive criminal activities of the defendant in the criminal forfeiture case prior to remanding it to the Court of Appeals for consideration of any excessiveness that might occur if the criminal forfeiture was upheld,[121] *Alexander* nonetheless further empowered forfeiture claimants to seek constitutional redress for forfeitures.

By 1993 property owners could boast of some improvement in their fledgling legal arsenal against the expanding use of forfeitures to buttress the government's War on Drugs. *92 Buena Vista Avenue* had weakened the relation-back doctrine to the extent that third parties obtaining a property interest subsequent to an illegal act involving the property were not automatically disenfranchised.[122] Prospective defense arguments could be made following *Halper* that civil forfeitures that sought awards grossly disproportionate to actual damages could be avoided as being punishments violative of the Double Jeopardy Clause of the Fifth Amendment.[123] *Austin* provided the basis for a property owner to assert the Excessive Fines Clause of the Eighth Amendment as a means to check the government's forfeiture authority if the usual function of forfeiture statutes at issue includes punishment.[124]

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[119] *Alexander*, 509 U.S. at 558 (citing *Austin*, 509 U.S. at 609-10).

[120] *Id.* at 559 n.4.

[121] *Id.* at 559.

[122] United States v. 92 Buena Vista Ave., 507 U.S. 111, 129 (1993).

[123] *See* United States v. Halper, 490 U.S. 435, 448-49 (1989).

[124] *See* Austin v. United States, 509 U.S. 602, 622 (1993).

E. Department of Revenue of Montana v. Kurth Ranch

Department of Revenue of Montana v. Kurth Ranch[125] brought the attention of the Supreme Court to a consideration of whether the Double Jeopardy Clause invalidated a state tax. After its ruling in *Austin*, the Court had no difficulty in disregarding the State of Montana's attempt to tax marijuana possession as being purely a civil matter.[126]

The Kurth Ranch's family owners were convicted of the ownership and possession of marijuana prior to any effort by Montana to collect the tax.[127] In fact, the statute required a person to be arrested before any tax liability was to be incurred.[128] The rate of the tax was inordinately high to be considered not to further the goal of punishment of a drug offender.[129] The Court also reasoned that there was little revenue-raising purpose underlying the tax since the marijuana had been destroyed by the State before the tax was sought to be imposed.[130] Because the state imposed the tax by means of a second, separate proceeding concerning the same illegal act of drug possession the Court invalidated the tax under the Double Jeopardy Clause.[131] The Court, however, left open the opportunity for a state to combine the assessment of such a tax within the original criminal prosecution of a defendant.[132]

F. United States v. $405,089.23 U.S. Currency *and* Ursery v. United States

Two cases subsequently arose that caused concern to law enforcement officials, hope for property owners, and confusion in the courts, both state and federal.[133] The 1994 decision of the Ninth Circuit in *United States v. $405,089.23 U.S. Currency*[134] and the 1995 decision of the Sixth Circuit in *United States v. Ursery*[135] not only provided additional case authority for counsel defending forfeiture cases, but also led to increased parity for defendants in plea-bargaining negotiations.

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[125] 511 U.S. 767 (1994).

[126] *Kurth Ranch*, 511 U.S. at 783.

[127] *Id.* at 771-73.

[128] *See* Dangerous Drug Tax Act, MONT. CODE ANN. § 15-25-11 (effective Oct. 1, 1987) (amended 1989 and repealed 1995).

[129] *Kurth Ranch*, 511 U.S. at 780.

[130] *Id.* at 783.

[131] *Id.* at 783-84.

[132] *Id.* at 788.

[133] *See, e.g.*, Barbara Grantland, *U.S. Supreme Court Agrees to Hear Three*

In situations where law enforcement officers had less than solid criminal cases or where they simply wanted the defendant's property more than the body of the defendant, it became immediately more common for negotiations to focus upon what amount of assets the defendant might agree to part with in order to prevent further confrontations with the government either criminally or civilly.[136]

In *$405,089.23 U.S. Currency*, the Ninth Circuit held that forfeitures under ostensibly civil, federal forfeiture statutes[137] included the objective of punishment and were, therefore, barred by the Double Jeopardy Clause when sought against property owned by persons already convicted of the underlying criminal offense(s).[138] The Sixth Circuit held in *Ursery* that a criminal conviction for manufacturing marijuana was not allowable where it followed a punitive forfeiture.[139]

More Forfeiture Cases, F.E.A.R. CHRONICLES NEWSLETTER, (Forfeiture Endangers American Rights Foundation, Washington, D.C.) (Mar. 1996) <http://www.fear.org/3scases.html> (referring to fact that Court was urged to review double jeopardy issues by filing of 41 amicus curiae briefs from 41 states and Puerto Rico); Jeffrey Steinborn, *U.S. Supreme Court to Review $405K*, F.E.A.R. CHRONICLES NEWSLETTER, (Forfeiture Endangers American Rights Foundation, Washington, D.C.) (Mar. 1996) <http://www.fear.org/405k32.html> (noting resultant situation where "thousands of inmates [were seeking] vacation of their convictions, or the return of property taken from them by the government").

[134] 33 F.3d 1210 (9th Cir. 1994), *reh'g denied*, 56 F.3d 41 (1995).

[135] 59 F.3d 568 (6th Cir. 1995).

[136] This is a time-worn practice that has always existed to a greater or lesser extent, depending upon the jurisdiction involved, which is not likely to disappear so long as forfeiture may attend criminal prosecutions in any respect.

[137] *See* 18 U.S.C. § 981(a)(1)(A) (Supp. 1999) (concerning property involved in money laundering); 21 U.S.C. § 881(a)(6) (1999) (concerning proceeds of drug dealing).

[138] *$405,089.23 U.S. Currency*, 33 F.3d at 1219.

[139] *Ursery*, 59 F.3d at 576. *See* 21 U.S.C. § 841(a)(1) (1999) (deeming manufacture of controlled substance illegal); 21 U.S.C. § 881(a)(7) (1999) (providing for forfeiture of real property used or intended to be used in drug transactions).

Both *$405,089.23 U.S. Currency* and *Ursery* included a determination by the respective Courts of Appeal that the forfeiture statute in question *per se* involved the infliction of punishment. Granting *certiorari*, the Supreme Court consolidated both cases for review.[140]

In *$405,089.23 U.S. Currency*, two claimants to Payback Mines, Inc. assets, Arlt and Wren, agreed that a forfeiture action brought by the United States against the corporation should be held in abeyance during the pendency of criminal charges against both Arlt and Wren.[141] After their convictions on multiple charges, summary judgment was granted the United States in the District Court in the forfeiture action.[142] Relying on *Halper* and *Austin*, the Ninth Circuit decided that the forfeiture was a second punishment of Arlt and Wren and was barred by the Double Jeopardy Clause.[143]

It was the criminal conviction that was voided in *Ursery* by the Sixth Circuit.[144] Mr. Ursery's home was seized after Michigan law enforcement officers executing a search warrant found seeds and other evidence that Ursery was growing marijuana.[145] Ursery effected a compromise with the United States to dispose of the forfeiture claim in return for his payment of $13,250 and was subsequently convicted of manufacturing marijuana.[146] Because it followed the prior punishment inflicted by the property forfeiture the Sixth Circuit set aside Ursery's criminal conviction.[147]

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[140] United States v. Ursery, 518 U.S. 267 (1996).

[141] *$405,089.23 U.S. Currency*, 33 F.3d at 1214.

[142] *Id.* The convictions included conspiracy to manufacture methamphetamine, conspiracy to launder money and additional counts of money laundering. *Id.*

[143] *Id.* at 1222.

[144] *Ursery*, 59 F.3d at 576.

[145] *Id.* at 570. Unhappily for Mr. Ursery, as pointed out by the dissent of Justice Stevens, the officers had erroneously believed that the house was part of the same property upon which Ursery was actually growing his marijuana crop. *Ursery*, 518 U.S. at 298 (Stevens, J., concurring in part, dissenting in part). The marijuana crop was on property belonging to another person. *Id.* (Stevens, J., concurring in part, dissenting in part). Ursery would have had no protection, nevertheless, for the paraphernalia and other contraband in his house.

[146] *Ursery*, 59 F.3d at 570. *See* 21 U.S.C. § 841(a)(1) (1999).

[147] *Ursery*, 59 F.3d at 575-76.

$405,089.23 U.S. Currency and *Ursery* fell clearly within the reasoning and historical underpinnings of *Halper*, *Austin*, and *Kurth Ranch*, or so at least it appeared to many property owners, law enforcement officials, lawyers, and members of the two respective Courts of Appeals. The full circle from the antiquated legal fiction of *in rem* civil actions where the property itself is considered the sole subject on trial to the enforcement of the safeguards of the Constitution in behalf of the real party in interest—the property owner—seemed to be a realistic possibility.

Chief Justice Rehnquist, writing for the Court,[148] thought that both the Sixth and Ninth Circuit Courts of Appeal had "misread *Halper*, *Austin,*, and *Kurth Ranch*" as somehow overruling *Various Items of Personal Property, One Lot Emerald Cut Stones*, and *One Assortment of 89 Firearms*.[149] In his dissent, Justice Stevens opined that "[i]t is the majority, however, that has 'misread' *Halper*, *Austin*, and *Kurth Ranch* by artificially cabining each to a separate sphere . . . and treating the three as if they concerned unrelated subjects."[150] A substantial portion of the majority's opinion in *Ursery* does reflect a concerted effort to delimit *Halper* and *Austin* to the most narrow of applications. As was stated by the Chief Justice in his *Ursery* opinion, *One Assortment of 89 Firearms* and its two-part test had not been previously overruled.[151] It was certainly subject to a resurrection beyond its original apparent value by the Chief Justice in his exposition of the confines of *Halper* and *Austin* to be expected henceforth. *Kurth Ranch* suffered a similar restrictive fate to *Halper* and *Austin*, receiving a rather perfunctory disposition in the *Ursery* opinion.[152]

The fundamental issue posed for the Court in *Ursery* was whether the civil forfeitures of the cases consolidated for review were "punishment" for purposes of the Double Jeopardy Clause. In deciding that the subject forfeitures were not subject to any Double Jeopardy prohibition, the language of *Ursery* has far broader import for the field of forfeiture law. Following the Court's rationale expressed in *Ursery*, a complete circle has been made from the more enlightened application of the Constitution to forfeitures under *Halper*, *Austin* and *Kurth Ranch* to a return to the medieval foundations from whence sprung the mechanistic appellation of *in rem* forfeitures as "civil" and, therefore, non-punitive. According to *Ursery*, the Supreme Court decision in *Various Items of Personal Property* does not support the proposition that an *in rem* civil forfeiture may be punishment subject to the Double Jeopardy Clause.[153]

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[148] United States v. Ursery, 518 U.S. 267, 269 (1996) (Chief Justice Rehnquist, with O'Connor, Souter, Ginsberg and Breyer, JJ. joining; Justice Kennedy concurring; Justice Scalia and Justice Thomas concurring in the judgment; Justice Stevens concurring in part and dissenting in part).

[149] *Id.* at 282.

[150] *Id.* at 305 (Stevens, J., concurring in part, dissenting in part).

[151] *Id.* at 278-81.

[152] *Id.* at 281.

Civil fines and penalties, under the *Ursery* Court's explanation of *Various Items of Personal Property*, could rarely and "in some circumstances" otherwise left undefined be considered as punishment.[154] This explanation is in accord with the sixty-year-old decision of *Various Items of Personal Property*, but is used by the Court to undermine a broader application of the subsequent cases of *One Lot Emerald Cut Stones* and *One Assortment of 89 Firearms*. The *Ursery* majority states that *One Lot Emerald Cut Stones* and *One Assortment of 89 Firearms* "reaffirmed the rule of *Various Items of Personal Property*"[155] that *in rem* forfeitures are not subject to the Double Jeopardy Clause.[156] This "reaffirmation" of *Various Items of Personal Property* is notable for the subtlety with which it was accomplished as *en fait accompli*. As noted in his dissent to *Ursery*, Justice Stevens pointed out that "in the sixty years since it was decided, *Various Items of Personal Property* has simply disappeared from our jurisprudence" and it was not "even mentioned" in *One Lot Emerald Cut Stones* or *One Assortment of 89 Firearms*.[157]

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[153] *Ursery*, 518 U.S. at 275. According to Chief Justice Rehnquist, such "a holding would have been quite remarkable." *Id.*

[154] *Id.* The Court compared the holding in *Various Items of Personal Property* with the reference to taxes found to be punitive under the Willis-Campbell Act in *United States v. Franca*, 282 U.S. 568 (1931). *Id.*

[155] *Id.* at 276.

[156] *Id.*

Further support was found by the *Ursery* majority for the continuing validity of *Various Items of Personal Property* by reference to the historical reticence of the Court for questioning the constitutionality of long-standing forfeiture statutes and legislation in general.[158]

With the *Various Items of Personal Property* holding that *in rem* forfeitures are not subject to Double Jeopardy scrutiny firmly in place, the *Ursery* Court then reviewed the instant case under the two-part test of *One Assortment of 89 Firearms*.[159] The deferential standard of judicial review, applicable to Congressional intent under part one of *One Assortment of 89 Firearms*, allowed the *Ursery* Court to find that the *in rem* procedure of "targeting the property itself" was a sufficient indicia that the forfeiture statutes in *Ursery* were intended to be civil in nature.[160] After the Court stated its "traditional understanding that civil forfeiture does not constitute punishment," the conclusion that the forfeitures in *Ursery* were civil precluded any real objective consideration by the Court as it applied the second part of the *One Assortment of 89 Firearms* test to determine whether the punitive effects of the statutes were so great as to remove them from their civil status.[161]

Conceding that punishment was a likely result of the forfeitures in *Ursery*, the Court found that permissible features of civil forfeiture are the "[encouragement] of property owners to take care of their property" and the prevention of the property being used again illegally.[162] If property owners' actions are the object of control by forfeiture statutes, any logical basis for the Court's determination that civil forfeiture is concerned with the "property itself"[163] is strained to incredulity.

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[157] *Id.* at 301-02 (Stevens, J., concurring in part, dissenting in part).

[158] *Ursery*, 518 U.S. at 276. The majority cited *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-328 (1936), for the proposition that established "legislative practice 'goes a long way in the direction of proving the presence of unassailable grounds for the constitutionality of the practice.'" *Id.*

[159] *Id.* at 288-91.

[160] *Id.* at 289.

[161] *Id.* at 287.

In its search of authority supportive of its decision in *Ursery*, the Court included decisions not based upon the Double Jeopardy or Excessive Fines Clauses, but rather extended its search for decisional authority to include references to the abatement of nuisances.[164] The inclusion of these references was not required as part of the constitutional issues considered by the Court in *Ursery* and was, presumably, intended to merely supplement the acceptance by the Court that other non-punishment and remedial goals are permissible within a forfeiture statute. If such a statute is not "punishment" under the Court's analysis, the inclusion of other issues, such as raised in nuisance cases, lends little support to the ultimate resolution of *Ursery* against the application of constitutional protections in civil forfeiture proceedings. In any event, the "clearest evidence" standard required of property owners under the second part of the *One Assortment of 89 Firearms* test provided additional grounds for the Court to reject the challenge to the forfeitures in *Ursery*.

Lest any doubt remained about the viability of the Double Jeopardy and Excessive Fines Clauses as methods by which property owners could seek relief from forfeitures brought as civil actions, Chief Justice Rehnquist attempted to dispel any perceived discrepancies between *Ursery* and those of *Halper*, *Austin*, and *Kurth Ranch* in a rather perfunctory manner. *Halper* was simply said not to apply to civil forfeitures because it would be too hard for the Court to balance the harm suffered by the property owner as a "penalty" with the harm suffered by the government in any given case.[165] *Halper* dealt with a civil penalty that was "grossly disproportionate" to the damages sought to be redressed by the United States.[166] This standard of proof had to be met by a property claimant in order to succeed in proving a forfeiture to be punitive as applied.[167]

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[162] *Id.* at 290.

[163] *Id.* at 289.

[164] *Id.* at 290. The Court referred to *Bennis v. Michigan*, 516 U.S. 442, 452 (1996), in which the forfeiture of an automobile was held permissible to prevent its further use for acts of prostitution. *Id.* The Court also noted a lower court decision in *United States v. 141 St. Bldg.*, 911 F.2d 870, 882 (2d Cir. 1990), allowing forfeiture of property used in selling cocaine. *Id.*

No discernible difference exists between this standard and the level of evidence to be adduced by a property claimant in meeting the burden of the "clearest evidence" standard required under the second part of *One Assortment of 89 Firearms*. Disregarding its ability to apply the former, the Court proceeded to have no difficulty in applying the latter to the instant cases consolidated for decision in *Ursery*.[168]

The ability of the Court to continue to apply the standard espoused in *Halper* was cast aside in order to discourage additional cases being brought forward on the basis of the Double Jeopardy Clause. The Court was by this mechanism able to uphold the more constitutionally limiting aspect of *Halper* and yet forestall any use of *Halper* to extend constitutional rights to persons at risk of their property being forfeited.

The Court then confused the distinction in *Austin* that "purely remedial" fines cannot be excessive[169] for purposes of the Excessive Fines Clause with its own determination that the forfeitures in *Ursery* served at least partially the goal of punishment.[170] Irrespective of its own use of *Austin* to buttress its finding that *in rem* forfeitures are not subject to Double Jeopardy, the Court then dismissed *Austin* as being exclusively an Excessive Fines Clause case and not applicable to

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[165] *Id.* at 284. Contrary to the holding in *Halper*, the Court in *Ursery* decided that a civil "penalty" is not the same as "punishment." *Id.*

[166] *Id.* at 280.

[167] *Id.*

[168] *Id.* at 289-90 n.3. The Court acknowledged that it was in fact applying the "clearest proof" standard. *Id.*

[169] Austin v. United States, 509 U.S. 602, 622 (1993).

[170] *Ursery*, 518 U.S. at 292.

Double Jeopardy issues.[171]

Kurth Ranch was an easier case for the Court to distinguish in its examination of the Double Jeopardy issue of *Ursery*. The fact that the state tax on marijuana in *Kurth Ranch* was only to be applied to persons already arrested, coupled with the transparent purpose of the tax to penalize rather than to raise revenue, caused it to be basically undisturbed by the *Ursery* decision.[172] Instead, the only use made of *Kurth Ranch* by the *Ursery* majority was to confine it to tax cases on the rationale that taxes "serve a purpose quite different from civil penalties."[173] The exact factual basis for *Kurth Ranch* is not likely to arise again following the Court's suggestion in the case prospectively approving the bringing of tax actions concurrent with criminal prosecutions as non-violative of the Double Jeopardy Clause.[174] The function of *Kurth Ranch* as an exposition of how facially remedial measures may still be punitive in overall effect and intent may yet endure.[175]

Finally, the Court indicated in *Ursery* that the fact that a forfeiture statute contains an "innocent owner" provision will not be determinative of a statute's intended status as punitive for Double Jeopardy purposes.[176]

Ursery, like its progenitors *One Lot Emerald Cut Stones* and *One Assortment of 89 Firearms*, exemplifies results-oriented decision making by the Supreme Court. The Court has now so eviscerated the holdings of *Halper* and *Austin*, and concomitantly limited the application of *Kurth Ranch* to cases involving taxes, so as to remove these decisions from realistic use by persons defending their property against forfeiture. By the simplistic machination of labeling a forfeiture statute as *in*

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[171] *Id.* at 286.

[172] *Id.* at 285-86.

[173] *Id.* at 286.

[174] Montana v. Kurth Ranch, 511 U.S. 767, 784 (1994).

[175] *See Ursery*, 518 U.S. at 311-12 (Stevens, J., concurring in part, dissenting in part).

[176] *Id.* at 292. Both 19 U.S.C. sections 881(a) and 981(a) contain innocent-owner provisions. *Id.*

rem and, *ergo*, a civil action, the United States may blithely proceed to take property unhampered by the Double Jeopardy Clause of the Fifth Amendment.[177] The Excessive Fines Clause of the Eighth Amendment, despite *Ursery*, has recently been found to remain an effective hurdle against some forfeiture actions by the government.[178]

Halper, Austin, and *Kurth Ranch* cannot be persuasively explained away by restricting their viability to their respective factual scenarios. That methodology is effectively the one undertaken by Chief Justice Rehnquist in his opinion for the *Ursery* majority. What remains is a classic triumph of "form over substance." A statute procedurally devised to be brought on the civil side of the docket that seeks the forfeiture of property is now entitled to the once-more sacrosanct appellation of *in rem*. The easy route taken by the *Ursery* Court, in relying regressively upon the legal fiction of *in rem*, provides incentive for prosecutors and law enforcement to keep expanding the use of forfeitures to obtain desired property.[179] A far different and more difficult route is now presented for a property owner anxious to prevent forfeiture.

VI. UNITED STATES V. BAJAKAJIAN: APPLICATION OF THE *IN REM / IN PERSONAM* DISTINCTION AND PROPORTIONALITY REVIEW IN FORFEITURES AFTER *URSERY*

Decided by a five-to-four majority on June 22, 1998, in *United States v. Bajakajian*[180] the Supreme Court again considered whether a forfeiture statute[181] was punitive and, if so, whether it was excessive under Eighth Amendment standards for proportionality.[182]

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[177] *Id.* at 321 (Stevens, J., concurring in part, dissenting in part). Justice Stevens argued that double jeopardy can now be avoided by the tactic of bringing proceedings *in rem*. *Id.* (Stevens, J., concurring in part, dissenting in part).

[178] United States v. Bajakajian, 84 F. 3d 334, 336-37 (9th Cir. 1996), *aff'd*, 118 S. Ct. 2028, 2041 (1998) (holding that Excessive Fines Clause applies to punishment resulting from *in personam* forfeiture).

[179] *Ursery*, 518 U.S. at 301 (Stevens, J., concurring in part, dissenting in part).

[180] 118 S. Ct. 2028 (1998). Justice Kennedy wrote the dissenting opinion, in which Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia joined. *Bajakajian*, 118 S. Ct. at 2041.

[181] *See* 18 U.S.C. § 982(a)(1).

Hosep Bajakajian was attempting to leave the United States with members of his family when he was stopped by officers of the United States Customs Service and informed that all currency amounts over $10,000 had to be declared when being taken out of the United States.[183] He admitted that he possessed $8,000 and that his wife had another $7,000 in her possession.[184] Apparently, he must not have known that the Customs officials had used a dog that had "alerted" them to the presence of currency in the Bajakajians' luggage.[185] Following a search of the Bajakajians and their belongings, some $357,144 in United States currency was found and seized.[186] Mr. Bajakajian was arrested and subsequently charged with violations of United States currency reporting laws.[187] The government sought forfeiture of the currency on the basis that Bajakajian had willfully failed to report the total amount of the currency.[188] Bajakajian entered a plea of guilty to a charge of failing to report all of the currency, while a charge of making a material false statement was dismissed.[189] Although the forfeiture proceeding was decided against him, the District Court ordered that only $15,000 of the $357,144 should be forfeited, even though the statutory forfeiture provision authorized "any property" which is "involved in" certain currency offenses to be forfeited.[190]

Agreeing with the finding of the District Court that forfeiture of the entire amount would be disproportionate to the offense and that the money had not been proven to have been used in any other crimes, the Court of Appeals for the Ninth Circuit affirmed.[191] Holding that the currency was not an "instrumentality" of the offense of failing to report and was, therefore, not forfeitable at all, the Court of Appeals did not dismiss the judgment awarding $15,000 since that issue had not been procedurally raised as a cross-appeal.[192] It was not necessary, therefore, for that court to consider whether the forfeiture was within the proportional application required by the Excessive Fines Clause.[193]

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[182] *Bajakajian*, 118 S. Ct. at 2031.

[183] *Id.* at 2032. *See* 31 U.S.C. § 5316(a) (reporting requirements).

[184] *Bajakajian*, 118 S. Ct. at 2032.

[185] *Id.*

[186] *Id.*

[187] *Id.* Bajakajian was indicted on three counts of violating United States currency reporting laws. *Id.*

[188] *Id. See* 18 U.S.C. § 982(a)(1).

[189] *Bajakajian*, 118 S. Ct. at 2032.

[190] *Id. See* 18 U.S.C. § 982(a)(1) (including any property involved in currency transportation in violation of 31 U.S.C. § 5316(a)(I)(A)).

The Supreme Court granted *certiorari* because the effect of the Court of Appeals' ruling was to find the forfeiture statute unconstitutional.[194] The Supreme Court held that the forfeiture of the full $357,144 would be "grossly disproportional" and would be violative of the Excessive Fines Clause.[195]

Referring to the position expressed earlier in *Austin*, that forfeitures are the same thing as fines when used to punish, the Court had "little trouble" finding the instant forfeiture to be "punishment."[196] The forfeiture in *Bajakajian* required a conviction[197] of the underlying offense of failing to report the transport of currency[198] before the forfeiture could be sought. The remedial purpose of detecting and deterring illegal activities involving currency, as alleged by the government, was rejected by the Court, reasoning that deterrence is more generally considered "a goal of punishment."[199]

Nor did the government's assertion that the forfeiture was remedial because it provided a means to recover incurred losses find favor with the Court. Justice Thomas, writing for the majority, failed to appreciate how the forfeiture of

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[191] *Bajakajian*, 118 S. Ct. at 2032-33.

[192] United States v. Bajakajian, 84 F.3d 334, 338 (9th Cir. 1996).

[193] *Id.* at 338.

[194] *Bajakajian*, 118 S. Ct. at 2033.

[195] *Id.* at 2038-39.

[196] *Id.* at 2033-34. *See* Austin v. United States, 509 U.S. 602, 609-10 (1993) (noting that Eighth Amendment "[limits] government's power to extract payments, whether in cash or in kind, as punishment for some offense").

[197] *See* 18 U.S.C. § 982(a)(1) (1998).

[198] *See* 31 U.S.C § 5316(a) (1998).

[199] *Bajakajian*, 118 S. Ct. at 2034.

Bajakajian's $357,144 would remedy any revenues lost by the United States.[200] Although Bajakajian had given conflicting stories about the origin and ownership of the money seized, the government had not proved the funds were associated with criminal activity other than Bajakajian's failing to report his possession of the money during his attempt to leave the country.[201] The forfeiture in *Bajakajian* was, therefore, not an *in rem* civil action allowable after a criminal conviction under the Court's Double Jeopardy Clause ruling in *Ursery*, but was instead an *in personam* proceeding designed to be a component of the punishment for the criminal conviction of not providing information about the transport of money, bringing it within the purview of the Excessive Fines Clause.[202]

The Court determined that the forfeiture in *Bajakajian* was brought, not to reach the fictionalized guilt of the property seized, but rather to punish the established culpability of Bajakajian.[203] The argument of the government that forfeitures of "tainted" property were traditionally approved could not succeed following this determination by the Court.[204] Unlike *in rem* civil proceedings in which the guilt or innocence of the owner remains essentially irrelevant, the forfeiture in *Bajakajian* was part and parcel of any fine and imprisonment authorized for the same offense.[205]

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[200] *Id.* The Court also concluded that the forfeiture in *Bajakajian* was punitive, unlike the forfeiture in *One Lot Emerald Cut Stones*, which was "a reasonable form of liquidated damages." *Id.* (citing One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972)).

[201] *Id.* at 2045 (Kennedy, J., dissenting).

[202] *Id.* at 2035-36.

[203] *Id.* at 2035.

[204] *Id.* at 2034.

[205] *Id.* at 2034-36. The Court considered it unnecessary to address a further argument by the United States that the currency was an "instrumentality" of the crime of failure to report currency movements. *Id.* at 2036. It was Bajakajian himself whom the government sought to punish and not the instrumentality, even if such was the currency. *Id.* Therefore, the Court appeared to relegate the applicability of the instrumentality of crime argument to *in rem* situations. *Id.* Without a formal consideration of the argument, instrumentality of crime factors may still play a role in *in rem* forfeitures. *See, e.g.*, *One (1) Charter Arms v. State*, 721 So. 2d 620 (Miss. 1998), and *infra* notes 226-35 and accompanying text.

After first determining that the forfeiture of *Bajakajian* was indeed a punishment and fine within the meaning of the Excessive Fines Clause, the Court focused the second part of its analysis on whether or not the forfeiture was excessive.[206] Reviving the proportional rationale advanced in *Austin*, the *Bajakajian* Court announced its holding that a "punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of [the] offense."[207] Finding no historical basis for a pre-determination of how much disproportionality is enough before a forfeiture is excessive under the Eighth Amendment, the Court weighed both the function of the legislature and the judgments of the lower courts as "relevant" to its own determination of "excessive."[208] Such a review allowed the Court not only to examine the historical underpinnings of statutes that permit varying proportions of property to be forfeited relative to the actual damages of the government or to the fine imposed upon a defendant, but also enabled the Court to weigh the specific claims at issue in *Bajakajian*.[209]

The verisimilitude of this analytical framework to that of *Austin*, and to that criticized by the majority in *Ursery* as being too difficult to apply in civil forfeitures, may be warranted. *Austin*, though limited by *Ursery*, has not been overruled. Partially distinguishable from *Ursery* as being the product of the different majority represented, *Bajakajian* is nonetheless explainable as strictly adhering to the realistic construction of a monetary forfeiture as being punishment within the scope of the Excessive Fines Clause. The majority in *Ursery* chose to consider the Double Jeopardy Clause as being quite separate and distinct from any application of the Excessive Fines Clause. The majority in *Bajakajian*, without the added burden of prior authority on the issue, was then free to look elsewhere for guidance in its setting of a standard for "excessiveness" under the Excessive Fines Clause. Precluded by its recent decision in *Ursery* from incorporating Double Jeopardy law, *Bajakajian* adopted the standard of "gross disproportionality" accepted in previous cases arising under the Cruel and Unusual Punishment Clause.[210]

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[206] *Bajakajian*, 118 S. Ct. at 2036.

[207] *Id. See* Austin v. United States, 509 U.S. 602, 622 (1993) (stating that government enlisted "too high a penalty in relation to the offense committed").

[208] *Bajakajian*, 118 S. Ct. at 2036-38.

[209] *Id.*

Significantly for forfeiture litigation, this standard places substantial reliance upon the building of case-by-case determinations of what is or is not "grossly disproportional" and, therefore, excessive under the Eighth Amendment. This approach may provide an alternative for property owners seeking constitutional protections against the expanded use of forfeitures expectable following *Ursery*. Development of defenses based upon the Excessive Fines Clause should not be limited to only those instances where forfeiture is sought after convictions for currency-reporting violations, but may be expected to include other areas of monetary forfeitures.

Justice Kennedy, in his dissent, considered *Bajakajian* to once more create a confusion of *in personam* punishment with the separate and historical goals of *in rem* forfeitures.[211] In his characterization of the majority opinion in *Bajakajian* as "disturbing . . . for the broader upheaval it foreshadows,"[212] Justice Kennedy's concern is not the oft-invoked fear of "opening the floodgates of litigation"; rather, he states the genuine likelihood that the legitimacy of many fines could be in question following the Court's holding in *Bajakajian*.[213] If purely remedial fines are determined to be immune from the Court's review by subsequent cases interpreting *Bajakajian*, it may well be that "[t]he irony of the case is that, in the end, it may stand for narrowing constitutional protection rather than enhancing it."[214]

Expressing his belief that the forfeiture of the entire

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[210] *Id.* at 2037 (citing Solem v. Helm, 463 U.S. 277, 288 (1983)).

[211] *Id.* at 2041-43 (Kennedy, J., dissenting).

[212] *Id.* at 2041 (Kennedy, J., dissenting).

[213] *Id.* at 2046-47 (Kennedy, J., dissenting).

[214] *Id.* at 2041 (Kennedy, J., dissenting).

$357,144 was constitutionally permissible and that such result was within the authority of Congress to prescribe "blanket punishment" to offset problems of proof in drug cases, Justice Kennedy was also apprehensive that the majority would by its decision exclude "instrumentalities of crime" from the definition of fines under the Excessive Fines Clause.[215] Further, the legislative remedy to the *in personam* treatment of the forfeiture in *Bajakajian* could be to adopt the expedient route of authorizing desired forfeitures to be procedurally brought *in rem*.[216] This postulate mirrors the concern expressed by Justice Stevens' dissent in *Ursery* in which he questioned whether the designation of a forfeiture as *in rem* might be sufficient to dissuade review by the Court, hence extinguishing the rights of a property owner.[217]

The Court has recognized that fines are a "unique" form of punishment because they not only punish the miscreant but also serve to enhance the coffers of the government.[218] A change in the burden of proof for the benefit of law enforcement objectives should not be allowed to displace a court's duty to scrutinize closely measures designed to raise money while serving the additional function of inflicting punishment.[219]

Although the majority in *Bajakajian* did not treat the currency involved as an instrumentality of crime,[220] it also did not decide that the Excessive Fines Clause could not apply to forfeitures of "instrumentalities," stating only that "instrumentality" forfeitures are "ipso facto punitive" when they include more than the property actually used to perpetrate a crime.[221]

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[215] *Id.* at 2043-46 (Kennedy, J., dissenting).

[216] *Id.* at 2046-47 (Kennedy, J., dissenting).

[217] United States v. Ursery, 518 U.S. 267, 302-05 (1996) (Stevens, J., concurring in part, dissenting in part) (referring to lack of Double Jeopardy Clause protection).

[218] *See* Harmelin v. Michigan, 501 U.S. 957, 978 n.9 (1991) (plurality opinion by Justice Scalia).

[219] *See* United States v. 6380 Little Canyon Road, 59 F.3d 974, 984-85 (9th Cir. 1995) (stating that duty of courts to insure protection of individuals continues despite *in rem* nature of forfeiture).

[220] *See* Austin v. United States, 509 U.S. 602, 627-28 (1993) (Scalia, J., concurring) (recognizing "instrumentality" of crime theory).

Nor did *Bajakajian* prohibit all continuation of the practice of considering factors that bear upon the issue of whether an item is an instrumentality of crime as part of its test for determining gross disproportionality under the Excessive Fines Clause.[222] The instrumentality approach of *Austin* allows judicial consideration of a property owner's personal involvement in the underlying offense for which forfeiture is sought, as well as the connection of the property to the offense. In this regard, instrumentality considerations not only serve to limit the physical amount of property to be forfeited, but also allow a court to review other "relevant" information about the defendant who also is a property claimant.[223]

It is reasonable to believe that the *Bajakajian* majority decision will not preclude review of instrumentality forfeitures, as suggested by the dissent, but will be helpful in utilizing instrumentality considerations in fleshing out the proportionality test for excessiveness under the Eighth Amendment. This method would complement the direct sentencing power of courts that considers punishment with regard both to the gravity of a crime and to a defendant's involvement in a crime.

In a state case applying its own excessive fines clause identical to the Eighth Amendment,[224] the Mississippi Supreme Court elected to apply a four-part test incorporating instrumentality and proportionality considerations to determine whether the forfeiture of a 1984 Corvette was excessive.[225] This case was decided after *Bajakajian* and, although not relying upon *Bajakajian* for its holding, the Mississippi court's decision is instructive of the direction available for other jurisdictions and property owners seeking to satisfy the gross disproportionality standard of *Bajakajian*.[226]

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[221] United States v. Bajakajian, 118 S. Ct. 2028, 2036-37 n.8 (1998).

[222] *See, e.g.,* United States v. 6040 Wentworth Ave. South, 123 F.3d 685 (8th Cir. 1997); United States v. Milbrand, 58 F.3d 841 (2d Cir. 1995).

[223] *Bajakajian*, 118 S. Ct. at 2037. The Court stated that other relevant evidence included reference to the Federal Sentencing Guidelines, which mandate pre-sentence reports regarding a defendant's personal involvement, educational and family background, remorse, financial circumstances, and acceptance of responsibility. *Id.* at 2038-39. Nothing in the *Bajakajian* majority opinion precludes a court from considering these factors in the context of a forfeiture action along with consideration of the possible fine(s) and/or imprisonment authorized in the criminal statute as part of determining "gross disproportionality" and "excessiveness." *Id.* at 2038-41.

[224] One (1) Charter Arms v. State, 721 So. 2d 620, 623 (Miss. 1998). The Mississippi Supreme Court noted that the Eight Amendment has not been found applicable to the various states, but referred to United States Supreme Court and Courts of Appeal decisions for guidance. *Id.*

In *One (1) Charter Arms*, officers found one rock of cocaine in the mouth of Williams, the owner and driver of the vehicle, as well as some drug paraphernalia in the vehicle.[227] Williams, who had no prior felony convictions for drug violations, entered a guilty plea to possession of cocaine and received three years probation (non-adjudication) and a $2,500 fine.[228] The State of Mississippi then sought an *in rem* forfeiture against Williams' vehicle, a 1984 Corvette.[229] Although the cocaine was actually found in Williams' mouth, as opposed to the vehicle itself,[230] the majority considered the vehicle to be properly forfeitable as an instrumentality used to transport Williams to buy drugs and to afford him a "measure of privacy in which to consume his ill-gotten drugs."[231] The effect of allowing the forfeiture on this basis was mitigated by the consideration of four factors (consisting of an admixture of instrumentality and proportionality considerations) including (1) the nexus between the offense and property, (2) the culpability of the property owner, (3) whether the property used in the offense was separable from the balance, and (4) other relevant facts that make the forfeiture "grossly disproportionate."[232] Applying the fourth factor, the court considered the defendant's lack of prior felony history and the amount of fine imposed directly upon him by the underlying criminal conviction in reaching its decision that forfeiture of the vehicle would be excessive and would "divest the owner of property which has a value that is grossly disproportionate to the crime or grossly disproportionate to the culpability of the owner."[233]

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[225] *Id.* at 625.

[226] *Id.* at 623 n.3. *Bajakajian*'s holding was based upon a forfeiture initiated as an *in personam* punishment authorized as part of the criminal case itself and did not expressly apply to an *in rem* proceeding that merely followed a criminal proceeding, as was the situation in *One (1) Charter Arms*. *See Bajakajian*, 118 S. Ct. at 2033.

[227] *One (1) Charter Arms*, 721 So. 2d at 621-22.

[228] *Id.* at 622.

[229] *Id. See* MISS. CODE ANN. § 41-29-153(a)(4) (1993).

[230] *See One (1) Charter Arms*, 721 So. 2d at 630 (Smith, J., dissenting) (noting that drug suspects commonly attempt to swallow drugs during drug arrest in order to dispose of evidence).

[231] *Id.* at 625.

This method of deciding whether an *in rem* forfeiture is excessive is consistent with the United States Supreme Court in its consideration of the *in personam* punishment sought in *Bajakajian*. In each case, the standard of review is one of proportionality, which in turn allows consideration of additional factors regarding the property owner and the gravity of the underlying offense. Use of instrumentality factors should be permissible, so long as that use enhances and does not compromise the standard of gross disproportionality set out by the Court in *Bajakajian* for cases applying the federal constitutional provision of the Excessive Fines Clause.

VII. The Effects of the Increased Use of Forfeitures

Most court decisions do not receive the ready interest of an audience wider than the legal profession. Such is not the situation with forfeiture cases. Law enforcement personnel, property owners, and other members of the body politic all share in the prompt dissemination and technical discussion of forfeiture decisions, both through and to their lawyers. Any statutory changes to forfeiture law are scrutinized with that same degree of attention. The varied perspectives of these groups insure that this result will continue.

As revealed in the discussion of historical and recent forfeiture case law, the property owner has always had an uphill battle to wage to preserve his claim to property subjected to forfeiture proceedings. Changes in forfeiture law, decisional or statutory, may fundamentally affect the rights available to a forfeiture claimant and, therefore, determine whether any defense to the forfeiture is to be offered at all.

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[232] *Id.* at 624-25.

[233] *Id.* at 625.

Members of the public are uniformly aware of the escalation of drug and drug-related crimes over the past decade. Taking the property of drug dealers and, often, drug users, is generally seen as a beneficial undertaking. In theory, at least, the criminal "drug element" of the population loses its ability to expand or to continue socially abhorrent enterprises when its assets are removed. Politicians and judges are keenly attuned to the need to be perceived as being "hard on drugs" and not to be labeled as being "soft on crime."[234] As a result, the seizure and forfeiture of drugs and drug-related assets is good public relations for office holders and seekers.

Even so, the assets seized and forfeited to the government are not used to build schools or hospitals or parks. Instead, the money, vehicles, boats and real properties that are forfeited usually remain under the use and control of the law enforcement agency that obtained the forfeiture. This may or may not be the agency that investigated the underlying crime. The advent of federal "adoption" proceedings allows a state or local law enforcement agency to use federal authorities to bypass more restrictive state forfeiture rules.[235] Once adopted, the forfeiture is then brought administratively by the Department of Justice[236] or, ultimately, resolved by the federal courts. The assets obtained in this manner are divided, by the contractual arrangements of multi-agency task forces or by *ad hoc* negotiations, between the participating law enforcement groups.[237]

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[234] Even though federal judges are appointed, the appointments are made by elected politicians. Many state judges, applying federal constitutional provisions in criminal and forfeiture cases, must win general elections before taking office. Even though ethical considerations are designed to prevent a judicial candidate from promising what he will do once elected, it regularly occurs that candidates will at least promise to punish drug offenders to the "full extent" of the law; the message clearly being that stiff sentences will be meted out in prospective cases.

[235] *See* Blumenson & Nilsen, *supra* note 20, at 51-54.

[236] *Id.*

The traditional boundaries between federal and state jurisdiction and cooperation have become blurred as a result of these forfeiture arrangements, most of which relate to alleged drug crimes. This increase in levels of cooperation is needed and has encouraged more effective exchange of information about mobile and technologically sophisticated drug violators. Less desirable aspects have also resulted from this pooling of resources devoted to obtaining forfeitures. Upward movement from one law enforcement job to another may be expedited for those officers who can attribute sufficient drug arrests and forfeitures to their efforts.[238] Budgetary reductions can be compensated for, and can be prevented, by possessing rates of drug arrests and forfeitures that are attractive to the funding entities.[239]

Even the United States government recognizes the potential for forfeited assets, particularly currency, to be misplaced or otherwise vanish due to lax accountability standards.[240]

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[237] *Id.*

[238] Field conversations between officers invariably elicit a statistical account of each other's seizure/forfeiture record. The use of traffic stops based on selective criteria (which may include vehicle registration, driver's appearance, direction of travel, and other factors) by highway patrol and other officers has brought these individuals directly into drug-enforcement and seizure roles once limited primarily to narcotics/vice officers. The "stops" may be, depending upon the jurisdiction, termed "profile," TCAP (travelling criminal apprehension program), or may have colloquial designations such as "Julio" stops (since Latinos may be the usual detainees in a particular geographical area) or other names. Now that forfeitures of vehicles for driving while intoxicated or while under the influence of drugs are being brought regularly additional fodder for these statistical conversations exists. Some officers also believe that federal law enforcement, due to its generally higher pay scales, is more easily obtainable if an officer has a record indicating a high rate of seizures and forfeitures.

[239] Higher arrest and forfeiture rates indicate that drug crimes are up, necessitating more funding to combat the problem. These rates do not necessarily indicate, however, that large-scale drug rings are being routed. Arrest figures can include "nickel and dime-bag" street vendors, who may have been arrested several times each during the course of a statistical period. Forfeitures can be targeted to provide the most money to an agency, but conversely involve persons other than those at the top of a drug ring.

[240] *See* General Accounting Office (GAO) Report to Congress, Vol. 199, No. 1 (Jan. 1, 1993) (listing Asset Forfeiture Program as one of seventeen "especially

Local officers often keep forfeited funds as "buy money" or reserve funds for equipment and other activities. The fact that record keeping varies substantially among the multitude of agencies and officers, with access to forfeited money and other items, raises concerns about the purposes of these "other activities."[241] Some criminal defendants may view the acts of crooked officers in taking funds or other more minor assets as just another cost of doing business in the drug trade.[242] Due to the detrimental effects to legitimate officers and property claimants any possible rationalization obviously cannot excuse the illegal behavior of some officers.

Vehicle forfeitures provide an additional opportunity for enthusiastic, if not unscrupulous, law enforcement officers to visit their power upon alleged drug suspects in a very personal manner. Officers, unable to make an effective criminal case against a suspect, who want to intimidate a suspect into parting with an interesting vehicle or who merely relish the power afforded them under forfeiture laws, may target a suspect's vehicle for forfeiture. If the vehicle is particularly attractive and expensive, the officer who fancies such a vehicle satisfies two desires by promoting forfeiture. The officer, or at least his department, retains the vehicle and the suspect is "punished" by its loss.[243]

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vulnerable areas" with high risk of "fraud, waste, abuse and mismanagement"), *available at* 1993 WL 2658795.

[241] *See* Matt Bai, *Mystery Lingers on Drug Proceed Split Records Show Money Seized Was Divided in Cash Form Despite Rule Calling for Issue of Check*, BOSTON GLOBE, Mar. 2, 1996, at 13 (reporting on officer who "forgot" that seized $22,000 had not been deposited into trust account); F.E.A.R.-List Bulletin (Jan. 12, 1996) (recounting New Jersey newspaper article detailing how prosecutor squandered forfeiture funds on "conventions," golf outings, and other entertainment) <http://www.fear.org>.

[242] Some defendants rationalize that they would take the money, if the opportunity presented itself, and do not expect underpaid officers, who are entitled to a "decent living," to do otherwise. Defense attorneys are accustomed to their drug and forfeiture clients complaining about money taken, but never listed on official reports. The potential problem of some clients in admitting to possessing any of the money seized compounds the dilemma of accounting for all of the currency and other assets seized for forfeiture.

[243] To those unfamiliar with practicalities of seizures the minimal amounts of

When law enforcement officers become so immersed in their pursuit of the rewards offered by forfeiture that their individual and collective vision becomes that of the zealot, the rules of law and reason no longer restrain them. Precisely that scenario resulted in the widely reported killing of California rancher Donald Scott.[244] Scott was shot and killed defending his home from what appeared to him to be armed intruders. The intruders were law enforcement officers, indeed armed, both with weapons and a search warrant. A follow-up investigation to the killing revealed, however, that the warrant was based upon false evidence in order to establish probable cause leading to an anticipated forfeiture of the multi-million dollar ranch.[245] The intensity of competitiveness for forfeiture assets is underscored by the investigation's further finding that although various law enforcement agencies were represented by the thirty officers involved, no one bothered to call in the county sheriff in whose jurisdiction the killing occurred because the organizing agency of the raid did not want to split any forfeiture proceeds that might result.[246]

The results of the investigation determined that the improperly obtained search warrant "became Donald Scott's death warrant."[247] The results also aptly concluded that a purpose of the operation was to garner the proceeds from the forfeiture of the $5 million ranch.[248]

With law enforcement agencies dependent upon forfeitures as a direct means of funding and aggrandizement, decisions such as *Ursery* will be hailed by them as promoting good law enforcement. Since the implications of the *Bajakajian*

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controlled or illegal substances used to justify forfeiture actions may be somewhat surprising. *See, e.g.*, One (1) Charter Arms v. State, 721 So. 2d 620, 630 (Miss. 1998) (Smith, J., dissenting) (noting that officers seized Corvette even though only trace of illegal substance was on suspect's teeth).

[244] *See, e.g.*, Blumenson & Nilsen, *supra* note 20, at 73-76.

[245] *Id.* at 74 (citing MICHAEL D. BRADBURY, OFFICE OF THE DISTRICT ATTORNEY OF VENTURA COUNTY, CA, REPORT ON THE DEATH OF DONALD SCOTT, Mar. 30, 1993).

[246] *Id.*

[247] *Id.*

[248] *Id.* at 74-75.

decision are less clear at the present, the question remains whether law enforcement officials or property owners will be the beneficiaries. The difficulty that pending legislation, most notably the Civil Asset Forfeiture Reform Act,[249] has encountered in achieving final passage indicates the reticence of law enforcement to lose any ability to tap the gold mine that is forfeiture.

The Civil Asset Forfeiture Act provides for improved notice of forfeitures to interested persons, mandates the availability of the innocent-owner defense to civil forfeitures, requires law enforcement agencies to protect an owner's interest by taking proper care of property during forfeiture proceedings, and requires the government to meet the higher standard of "clear and convincing" evidence in proving its claim for forfeiture.[250] The continuing sponsorship of this legislation and the ordinarily disparate politics of the private groups supporting the changes authorized by the Act[251] indicate that the popularity of changes in the methods, and perhaps uses, of forfeiture will inevitably mandate action by Congress.

VIII. RECOMMENDATIONS

The *in rem/in personam* method of classification of forfeitures has, and continues to, foster confusion in the law. The underlying premise that the property is on trial for its "guilt" belies reason and practical effect. Whether civil or criminal, the result of forfeiture is that a person, not the property, is punished.

Accordingly, the standards of proof and the additional provisions of the Civil Asset Forfeiture Reform Act should be adopted by Congress and implemented without delay. The claim and evidence then required of the government would be in accord with, and certainly no greater than, that required of it to punish individuals under corresponding criminal statutes. The property owner would then be able to present a defense based upon the fundamental principle that one is presumed innocent until proven guilty.

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[249] As first proposed by Representative Henry Hyde in 1993, now backed by twenty-nine sponsors, H.R. 1658 is currently pending in the United States Senate.

[250] H.R. 1658, 106th Cong. §§ 1-5 (1999).

[251] *See* Letter from Representative Henry Hyde, *Support of Bi-Partisan Civil Asset Forfeiture Reform*, (Mar. 30, 1998) (on file with ACLU at http://aclu.org/congress/lg033098a.html>.

To minimize the inherent abusive potential of forfeitures *any* assets acquired as a result of seizures and forfeitures should be sold and the proceeds deposited into the general treasury with a percentage returnable to the law enforcement agency responsible.[252] Inter-agency cooperation would not be prevented by this requirement. Revenue-sharing provisions could still be available both to compensate and reward participating law enforcement agencies. There would be a stronger disincentive, however, for law enforcement agencies and officers to target specific assets in hopes that they might receive personal use of those assets. The conflict of interest between enforcing the criminal law and the easier acquisition of assets by law enforcement is "out of control"[253] and requires additional safeguards to prevent its increasingly negative impact on law enforcement and property owners alike. As stated by Levy, "so long as innocence is an irrelevant consideration to the consideration of whether property is guilty, injustices will continue.[254] It may be added that so long as the *fictio* of the guilt or innocence of property is employed to prevent consideration of the guilt or innocence of a property owner who is able to avail himself of the most basic of legal safeguards, injustices will be unavoidable. The failure of the federal courts to delineate a clear standard which defines the requirements and limits of the innocent owner defense,[255] leaves congressional legislation as the most likely avenue for realistic reform of the forfeiture process. Since broad statutory authority can and has resulted in overreaching by governmental authorities in the area of forfeiture law it is appropriate that Congress bear a large proportion of the responsibility for reining in forfeiture abuses. A clear pronouncement by Congress in the form of an omnibus forfeiture act which provides for the general availability of, and sets forth reasonable requirements for, the innocent owner defense is past due and is essential to the ultimate resolution of the conflict between law enforcement and owners' interests in forfeiture proceedings.

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[252] *See* Blumenson & Nilsen, *supra* note 20, at 41.

[253] *The Civil Asset Forfeiture Reform Act of 1997: Hearings Before the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of Roger Pilon, Senior Fellow and Director of Center for Constitutional Studies at Cato Institute), *available at* 1997 WL 11233604.

[254] LEVY, A LICENSE TO STEAL—THE FORFEITURE OF PROPERTY, 160 (1996).

[255] *See id.* at 163-64.

It is significant that the passage of HR 1658, the "Civil Asset Forfeiture Reform Act of 1999" was accomplished with the unlikely admixture of support of, *inter alia*, the American Civil Liberties Union and the National Rifle Association.[256] With usually diverse cross-sections of the American polity now converging ideologically on this issue with the resultant convergent voting of political representatives supported by these groups, the seriousness of forfeiture abuse is becoming known outside of those persons who regularly benefit or who are victimized by its continuance. Regardless of the outcome of the Senate consideration of this measure as approved by the House of Representatives,[257] the impetus for reform is clearly gaining momentum and will not be dissuaded by a failure of the Senate to act to implement changes to the forfeiture laws this term.

Failing prompt legislative reforms, the viability of *Halper, Austin*, and *Kurth Ranch* may be re-examined following the Supreme Court's reluctance in *Bajakajian* to give law enforcement officials and prosecutors a "free hand" to seize and forfeit property without some constitutional oversight. Even if federal limits to the application of constitutional protections to forfeitures are not expanded, the respective states should be urged to consider the broader application of their own constitutions to protect their citizens.[258] Particularly, the availability of the innocent owner defense and the shifting of the burden of proof to the government[259] should be buttressed by state law. State rules of practice should limit the access of state prosecutors to the "adoption" mechanism of federal forfeiture proceedings to those cases in which state forfeiture proceedings are clearly inappropriate or ineffective, such law in cases involving substantial interstate or international criminal activity by putative owners of forfeitable property.

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[256] USA TODAY, June 24, 1999 discussing this unusual coalition prior to passage. The margin of passage of HR 1658 by the House of Representatives in June 1999 was 375 Representatives voting for versus 48 Representatives voting against; also discussing $5.9 billion in assets that have been seized since 1985 when the authority to seize property was extended).

[257] The Senate began its consideration of HR 1658 on July 21, 1999 in a hearing by the Criminal Justice Oversight Subcommittee-Senate Judiciary Committee.

The overall means of forfeiture as a means for combating crime may be debated as a matter of effectiveness[260] or as a matter of principle involving law and justice, but the success of forfeiture as a means of funding is not debatable. With some estimates of the overall value of forfeited assets now approaching $6 billion,[261] the efficacy of fund-raising by forfeiture is established by law enforcement in the United States. The political and practical effects of resources of this magnitude are not to be lost on voters, politicians or the courts. The use of forfeiture proceedings to impede criminal activity and to finance governmental objectives is clearly hear to stay. The issue is not whether the use will continue to be primary law enforcement tool, but to what degree reforms are to be made. In a recent statement correct both in its assessment of Anglo-American criminal procedure and in its comparison with current forfeiture law, Roger Pilon said, "Just as a man charged with a crime cannot put up as his defense all the good deeds he has done in his life, so too our forfeiture law cannot escape reform simply because it produces many good results."[262] For forfeiture to have continued viability, it must be perceived and must be implemented as justly sought and justly done. Otherwise, the use of forfeiture must ultimately fail as a tool of law enforcement. Recommendations as made in this article and elsewhere for the reform of existing forfeiture laws do not imperil law enforcement, but provide support for the enforcement of the laws of the Land without favor of personal interest.

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[258] *See, e.g.,* One (1) Charter Arms v. State, 721 So. 2d 620, 626 (Miss. 1998) and *supra* notes 224-33 and accompanying text.

[259] Both of which precepts are supported by HR 1658 as approved by the House of Representatives.

[260] R.B. Voas & S.A. Tippetts, *Assessment of Impoundment and Forfeiture Laws for Drivers Convicted of DUI, Phase II Report: Evaluation of Oregon and Washington Vehicle Plate Zebra Sticker Laws,*" Nat'l Hwy. Traffic Safety Admin., Report No. DOT H(a) 136 (1994). At least in driving under the influence cases, further criminal driving violations and recidivism rates appear not to be affected by the forfeiture of the offender's vehicle. One would be hard pressed, however, to argue that the actual loss of the financial resources to conduct criminal activities does not impact against the criminals involved, nor lessen their ability to expand or continue certain criminal enterprises.

[261] *See supra* note 256 (referring to $5.9 billion in assets seized since 1985).

IX. CONCLUSION

Tremendous tension remains between the legitimate goals of improving law enforcement while protecting persons and property. Criminals are not valued members of any society, yet a society that is permitted to treat its citizens as criminals without the full and equal protection of its laws imperils its own values. The ever-increasing use of forfeitures, predicated on out-moded legal fictions, to deprive owners of their property interests has prompted just such a result.

Ursery indicates a willingness of the United States Supreme Court to continue to rely upon the fictional role of property as somehow being capable of "guilt." *Bajakajian* may represent a slit in that reliance, which can be expanded by future cases. *Bajakajian* may, however, be evidence only of a rift in the current composition of the Court. Worse still, *Bajakajian* may ultimately reinforce *in rem* and *in personam* distinctions as suggested by Justice Kennedy in his dissent.

While the membership of the Court will inevitably change in forthcoming years and may lead to further changes in forfeiture law, the legal fiction of classifying forfeiture proceedings as *in rem* or *in personam* should be ended without hesitation. The proposals of the Civil Asset Forfeiture Reform Act represent reasonable first steps that, if adopted, will perhaps lead to that end. Without prompt legislative action of this kind to rectify the existing imbalances of forfeiture laws, forfeiture and not justice will continue to be the talisman that now guides many law enforcement and prosecutorial decisions.

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[262] Roger Pilon, Ph.D., Cato Institute, Washington, D.C., testifying before the Criminal Justice Oversight Subcommittee-Senate Judiciary Committee, regarding the HR 1658, the "Civil Asset Forfeiture Reform Act" on July 21, 1999.

SURVIVORSHIP CLAIMS UNDER EMPLOYMENT DISCRIMINATION STATUTES

Brian Owsley[*]

I. INTRODUCTION

When a plaintiff in a lawsuit dies before the trial court renders a final judgment in the action, there is often the question of whether the claim survives the plaintiff's death. If the claim survives, any monetary damages will become part of the decedent's estate and distributed to the appropriate beneficiaries. Periodically, an employment discrimination plaintiff dies before final judgment. Unfortunately, some federal courts have ruled that such claims do not survive the plaintiff's death. In *Allred v. Solaray, Inc.*, the district court dismissed the plaintiff's ADA claim based on AIDS discrimination after he died of AIDS.[1] Federal courts should always exercise considerable restraint when considering survival claims, but especially in ADA discrimination cases. One court noted that "given the high mortality of AIDS patients, [employers] may in fact feel free to discriminate against them."[2] In a front page headline, a local newspaper commenting on *Allred* discussed how the employer Solaray avoided liability merely because Allred died.[3]

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[1] Allred v. Solaray, Inc., 971 F. Supp. 1394, 1396 (D. Utah 1997).

[2] Oliver v. United States Army, 758 F. Supp. 484, 485 n.1 (E.D. Ark. 1990). *See also* Plumley v. Landmark Chevrolet, Inc., 122 F.3d 308, 310 (5th Cir. 1997) (involving victim of AIDS discrimination who died before trial); Westhoven v. Lincoln Foodservice Prods., Inc., 616 N.E.2d 778, 779 (Ind. Ct. App. 1993) (concerning personal representative of employee's estate who filed claim after

Persons with AIDS often experience discrimination.[4] In Utah, a federal court struck down a state law, which prohibited and voided marriages of persons who suffered from AIDS. The court found that such legislation violated the ADA and Rehabilitation Act.[5] Such legislation invariably stems, in part, from bias against persons with AIDS.[6]

When Congress enacted the Civil Rights Act of 1866, it required that federal courts apply relevant state law when that statute and its progeny were silent on an issue. As amended, the statute refers to three titles from the Revised Statutes of 1878. The title concerning civil rights governs only 42 U.S.C. §§ 1981, 1982-83, 1985-87, 1989-94 of the current code. In other words, § 1988(a) applies only to the Reconstruction civil rights acts. Consequently, § 1988 of title forty-two of the United States Code requires federal courts to apply relevant state law when civil rights statutes are silent on certain issues such as survivorship of a claim after the plaintiff has died.[7] There

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employee's death from AIDS); Karen Doore, *Survival of the Fittest? Waiting Out the Death of the Plaintiff In ADA Claims:* Allred v. Solaray, Inc., 1998 UTAH L. REV. 371, 383 (1998) (arguing employers may choose to discriminate against people with AIDS because death is likely). Similarly, in *U.S. EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995), the employee died from brain and lung cancer. *AIC Security Investigations*, 55 F.3d at 1278.

[3] Sheila R. McCann, *Worker's Death Lets Employer Off Legal Hook*, SALT LAKE TRIB., July 8, 1997, at A1.

[4] *See generally Funeral Home Ends Surcharge For AIDS*, N.Y. TIMES, Jan. 20, 1996, at 11; David Haldane, *Park Owner Surrenders in AIDS Suit Discrimination: Tenant who faced eviction after son with virus moved into mobile home settles for $25,000 and both may stay*, L.A. TIMES, Dec. 4, 1996, at B1; Peter Noah, *New Complications for AIDS Patients Law: Living longer, some survivors face bankruptcy, discrimination and work-related issues*, L.A. TIMES, June 16, 1997, at A1.

[5] T.E.P. v. Leavitt, 840 F. Supp. 110, 111 (D. Utah 1993).

[6] In *Doe v. William Shapiro, Esquire, P.C.*, 852 F. Supp. 1246, 1248 (E.D. Pa. 1994), a law firm fired an attorney eight days after he notified them that he had AIDS. The plaintiff argued that the termination resulted, in part, from fear of AIDS. *Id.*

[7] 42 U.S.C. § 1988(a) (1994).

is a conflict among federal courts, however, as to whether state law applies to the survivorship of claims raised under either Title I of the Americans with Disabilities Act of 1990[8] or Title VII of the Civil Rights Act of 1964.[9] Nonetheless, the better reasoned decisions determine that the language and history of § 1988 establish that state law applies only to actions raised under the Reconstruction civil rights acts.

Consequently, federal courts must apply federal common law rather than state law when determining the survivorship of employment discrimination claims.[10] A federal court, therefore, should determine first whether a statute is penal or remedial in nature. Only remedial statutes allow survivorship of claims. Because the ADA and Title VII are both remedial statutes, employment discrimination claims should survive an employee's death. Unfortunately, federal district courts are split on the survival of employment discrimination claims. Applying state survival law is not only contrary to the statute, but it may prevent a discrimination victim's estate from maintaining an action after the victim dies. Today this concern is heightened by the terminal and potentially fatal disabilities covered by the ADA.

This article examines the confusion among the decisions issued by all the courts that have addressed this issue. Section II analyzes the relevant legislative history which establishes that § 1988(a) does not apply to federal employment discrimination statutes. In Section III, the article examines the Supreme Court's approach under *Robertson v. Wegmann*[11] for Reconstruction civil rights acts. Section IV contrasts this approach with the method and standard applied by federal common law in employment discrimination cases. Finally, section V discusses cases where courts have misinterpreted the statute as well as cases in which courts correctly applied the standard in order to demonstrate the proper judicial approach.

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[8] 42 U.S.C. § 12101 *et seq.* (1994).

[9] 42 U.S.C. § 2000e *et seq.* (1994).

[10] *See infra* note 49 and accompanying text.

[11] 436 U.S. 584 (1978). In *Robertson*, the Court held that Louisiana state law applied to the survival of a claim raised under 42 U.S.C. § 1983. *Robertson*, 436 U.S. at 590-93. *See* discussion *infra* section III.

II. STATUTORY LANGUAGE AND LEGISLATIVE HISTORY

Congress originally enacted § 1988(a) as part of the Civil Rights Act of 1866 and codified it as section 722 in the Revised Statutes of 1878. That section stated, in relevant part, that

> [t]he jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adopted object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same in not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause.[12]

Nothing in the legislative history of the Act supports the interpretation that state law specifically applies to silence in employment discrimination statutes.[13] The only discussion of the influence of statutory and common law is in section 3 and merely restates the statute's own language. Instead, the debates focus on two main issues.[14] "The first [issue] was the addition of a citizenship clause, making persons born in this country United States citizens. Its purpose was to remove doubts about the Negro's citizenship status that persisted because of the decision in *Dred Scott v. Sandford*. . . ."[15]

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[12] Civil Rights Act of 1866, § 3, 14 Stat. 27 (1866). *See generally* EARL MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 61-78 (1990); John Hope Franklin, *The Civil Rights Act of 1866 Revisited,* 41 HASTINGS L.J. 1135 (1990); Robert Goldstein, *Blyew: Variations on a Jurisdictional Theme,* 41 STAN. L. REV. 469, 481 (1989) (discussing section 3); Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction,* 61 N.Y.U. L. REV. 863 (1986). *See also* Ku Klux Klan Act of 1871, § 1, 17 Stat. 13 (1871) (incorporating parts of Civil Rights Act of 1866); Enforcement Act of 1870, § 18, 16 Stat. 144 (1870) (re-enacting Civil Rights Act of 1866).

[13] *See generally* BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES CIVIL RIGHTS 106-50 (1970) (discussing the Congressional debate); Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981,* 98 YALE L.J. 541, 561-64 (1989) (same); Joseph Cook & John Sobieski, Jr., 1 Civil Rights Actions ¶ 1.19, 1-185-1-201 (1997) (same).

The other topic of debate, however, has some relevance for the issue of whether § 1988(a) applies to the survival of claims brought under federal employment discrimination statutes. It involved "the dropping in the House of the clause in the original bill containing a general prohibition against discrimination in civil rights on account of race."[16] Initially, the first section of the Act stated

> [t]hat there shall be no discrimination in civil *rights* or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery.[17]

When asked his understanding of civil rights, Senator Lyman Trumbull of Illinois defined them as "the right to make and enforce contracts, to sue and be sued and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property, and to full and equal benefit to all laws and proceedings for the security of person and property."[18] These factors do not apply to the rights afforded by Title VII and the ADA. Consequently, Congress during the Reconstruction era never contemplated extending the Civil Rights Act of 1866's coverage to protect the type of claims asserted in the employment discrimination statutes as well as the survival of such claims.

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[14] CONG. GLOBE, 39th Cong. 1st Sess. (1866); SCHWARTZ, *supra* note 13, at 112-13 (Sen. Trumbull); Theodore Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499, 533 (1980) (discussing section 3's significance).

[15] SCHWARTZ, *supra* note 13, at 100. *See also* MALTZ, *supra* note 12, at 62-63.

[16] SCHWARTZ, *supra* note 13, at 100.

[17] *Id.* at 107 (emphasis added). *See also* Cook & Sobieski, *supra* note 13, ¶1.19, at 1-186-1-188 (stating Senator Trumbull's discussion of civil rights). Ultimately, the first section included Senator Trumbull's understanding of civil rights. *See* Civil Rights Act of 1866, § 1, 14 Stat. 27 (stating that person should have right to "full and equal benefit of all laws").

[18] SCHWARTZ, *supra* note 13, at 113.

Twelve years later, with the Revised Statutes of 1878, Congress had made some changes in the statutory language, but the intent remained the same:

> The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title [XIII], and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause.[19]

Title 24 "was in the original 'Title "CIVIL RIGHTS,"' meaning title 24 of the Revised Statutes, consisting of R.S. §§ 1977 to 1991, which are classified to sections 1981 to 1983, 1985 to 1987, and 1989 to 1994 of this title [42 of the current code]."[20] Thus, the annotations clearly explain which federal civil rights acts are covered.

An understanding of Title 24's history illuminates the distinction between the employment discrimination acts and the Reconstruction civil rights acts. This distinction controls whether state or federal law applies to questions regarding survivorship of claims.

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[19] R.S. § 722 (1878). *See also* Seth Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 613-14 (1985) (discussing § 722).

[20] 42 U.S.C. § 1988 (1994), at References in Text. *See* U.S.C., Table II, Revised Statutes of 1878, at 95. Title 70 covered federal criminal statutes. *See* 42 U.S.C. § 1988, at References in Text. Similarly, Title 13 covered governance of the judiciary and the creation of jurisdiction. *See also* 42 U.S.C. § 1988 (1994), at References in Text; U.S.C., Table II, Revised Statutes of 1878, at 92-93.

The current version of the section as codified at 42 U.S.C. § 1988(a) remains similar to the original 1866 version and states, in pertinent part, that

> [t]he jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they [titles 13, 24, and 70 of the Revised Statutes] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern . . . in the disposition of the cause. [21]

Given the legislative history of § 1988(a), however, it does not apply to either Title VII or the ADA.[22] The legislative history of Title VII fails to specify how courts should address voids in the Act.[23] Similarly, the ADA's legislative history fails to address the survival of claims.[24] Finally, nothing in the Civil Rights Act of 1991 directly analyzes this question.[25] None of these three statutes refer to § 1988(a) or its relevant language.

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[21] 42 U.S.C. § 1988(a) (1994). *See generally* Kreimer, *supra* note 19, at 611-18; Eisenberg, *supra* note 14, at 518-21.

[22] Interpretations under Title VII are pertinent to the ADA because Title VII's enforcement mechanism applies to the ADA. *See* 42 U.S.C. § 12117(a) (1994) ("The powers, remedies, and procedures set forth in section[] 2000e-5 . . . of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, . . . or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter. . . . "). Similarly, the interpretations of cases brought under the Rehabilitation Act also apply to ADA claims. *See* 42 U.S.C. § 12201(a) (1994) (asserting "nothing in this Act shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title").

[23] *See generally* S. Rep. No. 88-872 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355; H.R. Rep. No. 88-914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391; Minority Report Upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substi-

Moreover, Congress expressly intended the enactment of the 1991 amendments "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection of victims of discrimination."[26] At the same time, it did not elect to supersede positive case law promoting federal common law as the means to determine the survivorship of employment discrimination claims. The spirit of the debate demonstrates congressional intent to broadly construe the remedial nature of employment discrimination statutes.[27] Therefore, applying § 1988(a) in a manner that restricts the survival of claims would thwart legislative intent of the ADA and Title VII.

Significantly, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, which amended § 1988, but again failed to extend § 1988(a)'s coverage to Title VII and other federal employment discrimination statutes.[28] At that time, however, it again chose not to comment on or to expand the scope of the language concerning the role of statutory or common law. Most important, it did not specifically amend the language to also apply § 1988 to Title VII, which by then had

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tute for H.R. 7152, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2431.

[24] *See generally* H.R. Rep. No. 101-485, pt. 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267; H.R. Rep. No. 101-485, pt. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303; H.R. Rep. No. 101-485, pt. 3 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445; H.R. Rep. No. 101-485, pt. 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 512; H.R. Conf. Rep. No. 101-596 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565.

[25] *See generally* H.R. Rep. No. 101-40, pt. 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267; H.R. Rep. No. 101-40, pt. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 694.

[26] Civil Rights Act of 1991, § 3(4), Pub. L. 102-166, 105 Stat. 1071.

[27] 1991 U.S.C.C.A.N. at 625-26.

[28] *Compare* Pub. L. 94-559, § 2, 90 Stat. 2641 codified at 42 U.S.C. § 1988 (1976) (showing enacted version of Act allows prevailing party to recover attorney's fees) *with* 42 U.S.C. § 1988 (1970) (demonstrating that earlier version of Act did not mention attorney's fees).

existed for twelve years. In fact, the 1976 language refers to the civil rights title by name; whereas, the current version of § 1988(a) refers to Title 24 of the Revised Statutes. Therefore, Congress has deliberately amended the language without including Title VII or the ADA in its scope.[29]

III. *ROBERTSON V. WEGMANN* AND ITS PROGENY

In *Robertson v. Wegmann*, the Supreme Court examined whether a § 1983 claim could survive under a Louisiana statute that permitted only a spouse, child, parent or sibling of the decedent to substitute for a plaintiff who dies.[30] The decedent's administratrix sued since the decedent did not have any of the specific relatives required by Louisiana law. The Court held that the district court must adopt Louisiana's statute because it was not inconsistent with federal law and the Constitution in the narrow context of these facts where the decedent did not have one of the statutorily required surviving relatives.[31]

Justice Thurgood Marshall, writing for the Court, explained that when "resolving questions of inconsistency between state and federal law raised under § 1988, courts must look not only at particular federal statutes and constitutional provisions, but also at 'the policies expressed in [them].'"[32]

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[29] *Compare* 42 U.S.C. § 1988 (1982) *with* 42 U.S.C. § 1988 (1988). *See also* 42 U.S.C. § 1988 (Supp. V 1993); Pub. L. 103-141, § 4, 107 Stat. 1489 (1993) (amending subsection (b)); Pub. L. 102-66, § 113(a), 105 Stat. 1079 (1991) (dividing the section into three subsections); 42 U.S.C. § 1988 (Supp. V 1981); Pub. L. 96-481, § 205(c), 94 Stat. 2330 (1980) (deleting language). *See infra* note 49 (discussing the applicability of federal common law).

[30] *Robertson*, 436 U.S. at 587. *See also* Eisenberg, *supra* note 14, at 502-05; Steven Steinglass, *Wrongful Death Actions and Section 1983*, 60 Ind. L.J. 559, 591-95 (1985) (examining *Robertson* decision); Cook & Sobieski, *supra* note 13, at ¶4.05, at 4-30.2-4-39 (discussing survival of civil rights actions).

[31] *Robertson*, 436 U.S. at 593. *See also* Steinglass, *supra* note 30, at 623-25 (discussing the inconsistency clause in § 1988).

[32] *Robertson*, 436 U.S. at 590 (quoting Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 240 (1969)). Justice Harry Blackmun's dissent, which was joined by Justices William Brennan and Byron White, noted that *Sullivan* surmised that either federal or state rules could be applied depending on "*whichever better serves the policies expressed in the federal statutes.*" *Id.* at 596 (italics in original) (quoting *Sullivan*, 396 U.S. at 240).

Therefore, as the Ninth Circuit invoking *Robertson* noted, "[i]n the civil rights context, we incorporate state law only where federal law is 'deficient in the provisions necessary to furnish suitable remedies,' and where the state rule is not 'inconsistent with the Constitution and laws of the United States.'"[33] Courts must examine the statute's federal policy goals when assessing inconsistency.[34]

While *Robertson* noted that a statute is not inconsistent merely because it bars a claim or "causes the plaintiff to lose the litigation,"[35] the Court expressed concern about situations where the application of state law would preclude an entire class of federal claims. Thus, the Court proclaimed that the "holding today is a narrow one, limited to situations in which no claim is made that state law generally is inhospitable to survival of § 1983 actions."[36] The Court found consolation in the fact that its holding would affect very few people since most decedents would have one of the statutorily mandated relatives.[37]

Since the Supreme Court decided *Robertson*, various courts have addressed the survival of § 1983 claims.[38] Generally courts have held that claims for compensatory and equitable damages survive where the state law creates a right of recovery.[39]

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[33] Botefur v. City of Eagle Point, 7 F.3d 152, 155-56 (9th Cir. 1993) (quoting 42 U.S.C. § 1988).

[34] *Robertson*, 436 U.S. at 590. *See also* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465 (1975) (holding "considerations of state law may be displaced where their application would be inconsistent with the federal policy").

[35] *Robertson*, 436 U.S. at 593.

[36] *Id.* at 594.

[37] *Id.* at 591-92. Professor Steinglass characterized the Court's interpretation of the inconsistency clause as timid. *See* Steinglass, *supra* note 30, at 624.

[38] *See, e.g.,* Rosa v. Cantrell, 705 F.2d 1208, 1224 (10th Cir. 1982); Davis v. Oregon State Univ., 591 F.2d 493, 498 (9th Cir. 1978); Strandell v. Jackson County, 648 F. Supp. 126, 132-33 (S.D. Ill. 1986); Gates v. Montalbano, 550 F. Supp. 81, 82-83 (N.D. Ill. 1982); Carter v. City of Emporia, 543 F. Supp. 354, 356-57 (D. Kan. 1982); Larson v. Wind, 542 F. Supp. 25, 26 (N.D. Ill. 1982); Guyton v. Phillips, 532 F. Supp. 1154, 1164 (N.D. Cal. 1981); O'Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1345, 1347 (E.D. Va. 1981); Roberts v. Rowe, 89 F.R.D. 398, 399 (S.D. W. Va. 1981).

[39] *See, e.g.,* Blake v. Katter, 693 F.2d 677, 683 (7th Cir. 1982) (holding that

Some courts, however, have denied any recovery by the decedent's estate for the victim's civil rights claims.[40] This approach is incorrect based on the statutory language and the legislative history. Instead, where the state law is inconsistent with the Constitution or with federal law, courts must apply federal common law. In *Carlson v. Green*,[41] the Supreme Court stated that federal common law applies to federally created rights.[42] One scholar, however, wrote that "[i]n approaching § 1988, the [Supreme] Court has never made clear whether a court making a deficiency finding should consider the federal common law."[43] Although the jurisprudence is muddled at times, courts usually find state laws consistent with the purposes of federal civil rights laws.[44]

IV. ADEA CASES

Unlike cases filed under the Reconstruction civil rights acts, federal courts examining survivorship of claims brought under the Age Discrimination in Employment Act of 1967[45]

"cause of action was not abated when Blake died" because the court "reject[ed] the practice of characterizing civil rights claims as common law torts"); Barret v. United States, 689 F.2d 324, 331 (2d Cir. 1982) (holding that "under New York law § 1983 claim survives"); *Guyton*, 532 F. Supp. at 1164 (holding California law provides for survival of § 1983 claim); Wager v. Hasenkrug, 486 F. Supp. 47, 50 n.1 (D. Mont. 1980) (concluding that Montana law provides for survival of § 1983 claim); *Roberts*, 89 F.R.D. at 399 (stating that "West Virginia law provides that actions do survive death of a party and may be revived.").

[40] *See, e.g.*, Missildine v. City of Montgomery, 907 F. Supp. 1501, 1504-05 (M.D. Ala. 1995) (concluding § 1983 as tort claim does not survive where no action had been filed); *Carter*,. 543 F. Supp. at 356-57 (holding that claim under § 1983 is permissible but not under §§ 1981, 1985, 1986); Jones v. George, 533 F. Supp. 1293, 1301 (S.D. W. VA. 1982) (holding § 1983 claim for wrongful death does not survive because it was for personal injuries resulting in death); Brown v. Morgan County, 518 F. Supp. 661, 662 (N.D. Ala. 1981) (stating no compensatory damages can be awarded under § 1983).

[41] 446 U.S. 14 (1980).

[42] *Carlson*, 446 U.S. at 23 (holding that *Bivens* actions are created by federal law and, therefore, uniform federal rule should govern).

[43] Steinglass, *supra* note 30, at 614.

[44] *Ex Parte* Schreiber, 110 U.S. 76, 80 (1884) (concluding that under federal common law, punitive action abates upon plaintiff's death).

[45] 29 U.S.C. § 621, *et seq.* (1994).

have determined that state law does not apply.[46] For example, in *Fariss v. Lynchburg Foundry*, the Fourth Circuit ruled that "[i]t is clear that an ADEA claim survives death of the original plaintiff and is subject to revival by his legal representative as a matter of federal law."[47]

Instead of state law, the Supreme Court has determined that the issue of survival of a federal claim is governed by federal common law.[48] Therefore, courts have applied federal common law to fill gaps in the ADEA.[49]

Under federal common law, a court must determine, based on the particular statute's language and history, whether the statute's purpose is penal or remedial. Ordinarily, a cause of action that is remedial in nature survives the death of the plaintiff, while one that is penal does not. For example, in *Smith v. Department of Human Services*, the Tenth Circuit adopted

> a three-factor analysis requiring an assessment of "1) whether

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[46] *See, e.g.,* Smith v. Department of Human Servs., 876 F.2d 832, 834-35 (10th Cir. 1989); Fariss v. Lynchburg Foundry, 769 F.2d 958, 962 n.3 (4th Cir. 1985); Estwick v. U.S. Air Shuttle, 950 F. Supp. 493, 498 (E.D.N.Y. 1996); Hawes v. Johnson & Johnson, 940 F. Supp. 697, 702 (D.N.J. 1996); Caraballo v. South Stevedoring, Inc., 932 F. Supp. 1462, 1466 (S.D. Fla. 1996); Duart v. FMC Wyo. Corp., 859 F. Supp. 1447, 1451 n.2 (D. Wyo. 1994) (citing *Smith*, 876 F.2d at 835); Shkolnik v. Combustion Eng'g, Inc., 856 F. Supp. 82, 87-88 (D. Conn. 1994); Khan v. Grotnes Metalforming Sys., Inc., 679 F. Supp. 751, 756 (N.D. Ill. 1988); Asklar v. Honeywell, Inc., 95 F.R.D. 419, 423 (D. Conn. 1982).

[47] *Fariss*, 769 F.2d at 962 n.3 (citing *Asklar*, 95 F.R.D. at 424).

[48] Carlson v. Green, 446 U.S. 14, 23 (1980) ("*Bivens* actions are a creation of federal law, and therefore, the question whether respondent's action survived Jones' death is a question of federal law."). *See also Ex Parte Schreiber*, 110 U.S. at 80 (establishing the application of federal common law to survival claims under federal laws).

[49] *See, e.g.,* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985) (holding liquidated damages are punitive in nature); *Smith*, 876 F.2d at 834-35 (holding that general rule under federal law is that there is no survivorship of penalty actions); *Fariss*, 769 F.2d at 962 n.3 ("Where a federal question [such as an ADEA claim] is presented, federal law, rather than state law governs survival."); *Estwick*, 950 F. Supp. at 498 ("whether an action created by federal statutory law survives the death of the plaintiff is a matter of federal common law"); *Khan*, 679 F. Supp. at 756 ("action under the ADEA is not penal in nature, and survives the death of the defendant").

> the purpose of the statute was to redress individual wrongs or more general wrongs to the public; 2) whether recovery under the statute runs to the harmed individual or to the public; and 3) whether the recovery authorized by the statute is wholly disproportionate to harm suffered.[50]

Applying federal common law to an ADEA claim, the Tenth Circuit in *Smith v. Department of Human Services* recognized that "claims for reinstatement, backpay, and other benefits under the ADEA are clearly remedial in nature."[51]

Scholars have noted that when § 1988(a) does not apply, courts have considerably more flexibility when determining survival of claims. Most important, they "are free to fashion federal common law rules to determine whether a civil rights claim survives, without regard to any inconsistent state law."[52] It is this approach that applies to other employment discrimination claims.

V. TITLE VII AND ADA CASES

Some courts have relied on § 1988(a) to apply state law to claim survival notwithstanding the clear statutory language indicating § 1988(a) does not govern Title VII and the ADA claims.[53]

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[50] *Smith*, 876 F.2d at 835 (quoting Murphy v. Household Fin. Corp., 560 F.2d 206, 209 (6th Cir. 1977)).

[51] *Id.* at 837; *see also Khan*, 679 F. Supp. at 756 (stating that, although ADEA provides liquidated damages, it principally compensates victims of age discrimination).

[52] Cook & Sobieski, *supra* note 13, at ¶4.05, at 4-36.

[53] *See, e.g.,* Allred v. Solaray, Inc., 971 F. Supp. 1394, 1396 (D. Utah 1997) (applying § 1988 since ADA is silent on survivability); Hilsabeck v. Lane Co., 168 F.R.D. 313, 314-15 (D. Kan. 1996) (looking to Kansas law to determine survivability of Title VII claim); Rosenblum v. Colorado Dep't of Health, 878 F. Supp. 1404, 1408 (D. Colo. 1994) (looking to § 1988 since the ADA is silent on survivability); United States v. Morvant, 843 F. Supp. 1092, 1095 (E.D. La. 1994) (same); Anspach v. Tompkins Indus., Inc., 817 F. Supp. 1499, 1510 (D. Kan. 1993) (holding that Title VII claim is personal injury action which survives under Kansas law); Small v. American Tel. & Tel., Co., 759 F. Supp. 1427, 1428 (W.D. Mo. 1991) (applying state law to determine survivability of Title VII claim pursuant to § 1988); Hamilton v. Rogers, 573 F. Supp. 452, 453 (S.D. Tex. 1983) (holding that § 1988 governs when "federal civil rights laws are deficient in the provisions

In *Slade for Estate of Slade v. United States Postal Service*,[54] the plaintiff filed a complaint of race discrimination. After the plaintiff died, his wife petitioned the appellate court to substitute her on behalf of her husband after the district court entered an order dismissing the action.[55] The Tenth Circuit recognized the rule enunciated in *Smith v. Department of Human Services*, but without explanation, applied state law to the plaintiff's Title VII claim.[56] The *Slade* court erroneously cited the Seventh Circuit's decision in *Bennett v. Tucker*,[57] which involved a claim brought under § 1983 to which § 1988 clearly applies.[58] Other courts have also adopted this flawed analysis.

In *Small v. American Telephone & Telegraph Co.*, the plaintiff brought a § 1981 claim, which like a § 1983 claim is covered by § 1988.[59] The plaintiff's Title VII claim alleged that AT&T discriminated against him on the basis of race. The plaintiff cited *Kilgo v. Bowman Transportation, Inc.*[60] to support his claim that Title VII claims survive a victim's death.[61] The court ignored *Kilgo*'s reasoning, however, and held that under Missouri's survival statute, Small's Title VII claim survived.[62]

Similarly, in *Hamilton v. Rogers*, the plaintiff raised claims under Title VII, § 1981, § 1983 and § 1985.[63] Although

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necessary to furnish suitable remedies"); Earvin v. Warner-Jenkinson Co., No. 4:94 CV 977, 1995 WL 137437, at *1 (E.D. Mo. Mar. 10, 1995) ("whether plaintiff's claims survive his death, the first touchstone is 42 U.S.C. § 1988(a)"); Le Beau v. Libbey-Owens-Ford Co., No. 71 C 1902, 1982 WL 580, at *3 n.2, ¶ 8 (N.D. Ill. Mar. 31, 1982) ("There is no federal rule as to survival of such a Title VII action.").

[54] 952 F.2d 357 (10th Cir. 1991).

[55] *Slade*, 952 F.2d at 359.

[56] *Id.* at 360. In *Smith*, the Tenth Circuit held that state survival laws do not apply to ADEA actions. *See Smith*, 876 F.2d at 835.

[57] 827 F.2d 63, 67 (7th Cir. 1987).

[58] *Id.* at 67.

[59] *Small*, 759 F. Supp. at 1428-29.

[60] 789 F.2d 859 (11th Cir. 1986).

[61] *Small*, 759 F. Supp. at 1428.

[62] *Id.* at 1430.

[63] *Hamilton*, 573 F. Supp. at 453-54.

Hamilton's Title VII claim alleged that race discrimination caused the plaintiff's high blood pressure and other health problems, his estate representative did not assert that these problems caused his death. As in *Small*, the court assumed that § 1988(a) governed, but held that the Texas survival statute allowed most of the claims, including Hamilton's Title VII claim.[64]

In ADA cases, however, plaintiffs are more likely to die directly as a result of the disabilities for which they were discriminated. In *Allred v. Solaray*, the plaintiff lost his job after his employer learned that he had AIDS. After the plaintiff filed his complaint, he died of complications of AIDS.[65] The district court granted the employer's motion for summary judgment on the grounds that the claim did not survive under Utah law.[66]

Similarly, in *United States v. Morvant*, the victim had AIDS. A dentist refused to provide patients routine dental care after learning that they tested positive for HIV.[67] Although this case did not involve employment discrimination, the court applied the same analysis and standard as applied in an ADA employment claim. Analyzing Louisiana law instead of federal law, the district court determined that the claim survived the patient's death.

In *Rosenblum v. Colorado Department of Health*, the plaintiff suffered from diabetes which did not interfere with her job performance provided she had reasonable accommodations. The supervisor ridiculed and abused the plaintiff based on stereotypes and her medical need for frequent bathroom and snack breaks. Eventually the stress from the discrimination caused her to go on short-term disability. When she exhausted all of her leave, her employer terminated her.[68] After she died, the district court applied § 1988(a) to determine which damages survived.[69]

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[64] *Id.* at 453-54.

[65] *Allred*, 971 F. Supp. at 1396. It should be noted that in *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Supreme Court held that "HIV infection is a physical impairment which substantially limits a major life activity. . . ." *Bragdon*, 524 U.S. at 641.

[66] *Allred*, 971 F. Supp. at 1398; *see generally*, Doore, *supra* note 2.

[67] *Morvant*, 843 F. Supp. at 1093-94.

[68] *Rosenblum*, 878 F. Supp. at 1405-07.

In all of these cases, the courts misread *Robertson* to reach these results. *Robertson* involved an analysis of survival of a § 1983 claim as opposed to claims under Title VII or the ADA. § 1988 explicitly applies to § 1983 claims based on the statutory language. The legislative history of § 1988(a), however, demonstrates that it does not apply to employment discrimination claims. Consequently, *Robertson* has no application to the issue presented in these cases.

None of the sections in the Revised Statutes, to which § 1988(a) applies, refer to either the ADA or Title VII inasmuch as the recodification of the Revised Statutes occurred before the enactment of Title VII in 1964. Accordingly, these courts erred in applying state law to the ADA pursuant to § 1988(a).[70] Professor Eisenberg noted that § 1988(a) was expressly limited to civil rights cases.[71] Other courts have followed this approach.

In *Kilgo*, the plaintiff Edna Kilgo alleged gender discrimination after a trucking company refused to accept her application.[72] After Kilgo died,

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[69] *Id.* at 1408-09.

[70] *See* Fleming v. United States Postal Serv., 27 F.3d 259, 262 (7th Cir. 1994) (holding Title VII and Rehabilitation Act "are not affected by 42 U.S.C. § 1988(a)"); Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 875-76 (11th Cir. 1986) (acknowledging but declining to decide said issue, since both federal and state law reach same conclusion); Scott v. University of Del., 601 F.2d 76, 81 n.8 (3d Cir. 1979) (involving Title VII "claim for back pay and damages survives his death"); Estwick v. U.S. Air Shuttle, 950 F. Supp. 493, 498 (E.D.N.Y. 1996) (holding that because Title VII and ADA claims are not penal in nature, they survive under federal common law); Caraballo v. South Stevedoring, Inc., 932 F. Supp. 1462, 1466 (S.D. Fla. 1996) (deciding that ADA punitive damages claim does not survive employee's death under federal common law); Khan v. Grotnes Metalforming Sys., Inc., 679 F. Supp. 751, 756 (N.D. Ill. 1988) (finding that § 1988 inapplicable to Title VII claims); Reid v. IBM Corp., 74 Fair Empl. Prac. Cas. (BNA) 332, 342 (S.D.N.Y. 1997) (holding that § 1988(a) does not govern Title VII claims); Berger v. Iron Workers, Reinforced Rodmen Local 201, Civ. A. No. 7517743 (TJP/PJA), 1990 WL 170673, at *2 (D.D.C. Oct. 24, 1990) (unpublished) (concluding that survivability is same whether based on federal common law or law of District of Columbia).

[71] Eisenberg, *supra* note 14, at 524. Although he did not explicitly limit these cases to the Reconstruction Civil Rights Acts, the analysis in his article only considers those statutes.

> the district court held that Kilgo's Title VII claim survived her death, and thus permitted the substitution of her husband, Oscar Kilgo, as a named plaintiff in his capacity as the representative of her estate.[73]

Affirming the district court, the Eleventh Circuit simply stated that "[a] Title VII cause of action would also survive under federal common law."[74] In reaching this conclusion, it relied on the precedent from a claim brought under the Truth-in-Lending Act.[75] The court reached the correct result because it realized that federal common law applied as opposed to state law based on the applicability of § 1988(a). The court looked to case law from the Fifth Circuit for guidance on what federal common law dictated.

In *Khan v. Grotnes Metal Forming System, Inc.*, which involved an age discrimination claim, the court explained that Title VII does "not contain a provision similar to 42 U.S.C. § 1988. Therefore, the court must look to the federal common law."[76] Unfortunately, *Khan* and the other decisions do not analyze the reasons why § 1988 does not apply to employment discrimination statutes. For example, in *Fleming v. United Postal Service AMF O'Hare*, the Seventh Circuit merely noted that Title VII and the Rehabilitation Act "are not affected by 42 U.S.C. § 1988(a)."[77] In *Reid v. IBM Corp.*, the district court, relying on *Fleming*, determined that "Title VII claims are not covered by § 1988(a)."[78] Similarly, in *Estwick v. U.S. Air Shuttle*, after determining that neither Title VII nor the ADA address survival claims, the court applied the test outlined by the Tenth Circuit in *Smith* without mentioning § 1988.[79]

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[72] *Kilgo*, 789 F.2d at 864.

[73] *Id.* (citing Kilgo v. Bowman Transp., Inc., 87 F.R.D. 26, 27-28 (N.D. Ga. 1980)).

[74] *Kilgo*, 789 F.2d at 876.

[75] *Id.* (citing James v. Home Constr. Co. of Mobile, 621 F.2d 727, 729-30 (5th Cir. 1980) and 15 U.S.C. § 1635). *See also Berger*, 1990 WL 170673, at *2 (relying on *James* for same proposition).

[76] *Khan*, 679 F. Supp. at 756. Additionally, in *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1278 (7th Cir. 1995), the employee had died and a relative was substituted as his personal representative. Instead of addressing the question of survivorship, the court appeared to accept as a matter of course that the claims survived. *See AIC Security Investigations*, 55 F.3d at 1278.

[77] *Fleming*, 27 F.3d at 262.

VI. CONCLUSION

With the enactment of the ADA, more individuals with AIDS and other life-threatening conditions may have actionable employment discrimination claims. Therefore, it is especially important for courts to properly understand that § 1988(a) does not apply to employment discrimination claims. Instead, courts must apply federal common law.

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[78] *Reid*, 74 Fair. Empl. Prac. Cas. at 342.

[79] *Estwick*, 950 F. Supp. at 498.

OBSERVING CAPITAL PUNISHMENT IN ARNOLD BENNETT'S *THE OLD WIVES' TALE*

Michael H. Hoffheimer[*]

I. THE PROGRESSIVE ERA CRITIQUE OF CAPITAL PUNISHMENT

In 1924 one of the defense experts in the Leopold and Loeb murder case came to sympathize more with the killers than with the prosecutor. To Clarence Darrow he wrote:

> To me it is an infinitely more discouraging and disheartening spectacle to see a public official, presumably an adult of experience and judicial mind, sworn to look after the public interest—presumably with an eye to doing the best that can be done for the public good, now and hereafter—exhibit apparently nothing but a lust for blood than it is to see two adolescent youths stumble and fall when they try to pass the threshold that separates childhood from manhood.[1]

This attitude was new. Revealing the influence of modern theories in psychology, it also signaled a change in perspective characterized by a critical distancing from the public voices that demanded the infliction of the death penalty.

Literary depictions of capital punishment in the early twentieth century prefigured this new attitude. Of course literary accounts of unjust executions were not new,[2] nor was a universal, humanist sympathy with the plight of the prisoner.[3] Already in the eighteenth century, Hogarth treated the death penalty with ambivalence,[4] depicting it as both the result of cruelty and its ultimate expression.[5] In the 1800s the portrayal—and implicit critique—of exorbitant or disproportionate vengeance provided a central and recurring theme in novels.[6]

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[1] HAL HIGDON, LEOPOLD AND LOEB: THE CRIME OF THE CENTURY 22 (Univ. of Ill. Press 1999) (1975) (quoting letter of Dr. William Alanson White). Higdon's notes identify the source only as "Dr. William A. White's papers, National Archives." *Id.* at 360 n.20.

Early twentieth-century writers devoted special attention to the public desire to observe the infliction of capital punishment, representing this observing of death as both pleasurable and repulsive, gratifying and self-destructive. Among powerful portrayals of capital retribution that focused on the role of the observer are the so-called Cyclops episode in *Ulysses*[7] and the treatment of two executions in Arnold Bennett's masterpiece *The Old Wives' Tale*.[8]

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[2] In *Frankenstein*, for example, one of the monster's most horrible deeds is causing the execution of an innocent person. After killing Frankenstein's young brother, the monster plants incriminating evidence on an innocent servant who is then convicted of murder and executed. Frankenstein characterizes her death as even worse than the killing of the child. *See* MARY WOLLSTONECRAFT SHELLEY, FRANKENSTEIN, OR, THE MODERN PROMETHEUS 76-77, 139-40 (James Rieger ed., Univ. of Chicago Press 1982) (1818).

[3] As Leonora declares in Act II of *Fidelio*, "Whoever you are, I will save you." *Fidelio: An Opera In Two Acts*, Act II, scene I (libretto by Joseph Sonnleithner).

[4] Jenny Uglow goes still further in reading Hogarth's treatment of the judgment of the idle apprentice as ironic: "Tom [the idle apprentice] is a felon, who spills no blood; Goodchild is a model citizen, whose judgment slays his fellow." JENNY UGLOW, HOGARTH: A LIFE AND A WORLD 446 (1997). It is doubtful, however, that Hogarth any more than Fielding perceived any irony in sentencing nonviolent felons to death. Furthermore, Hogarth portrayed the idle apprentice with arms, adjacent to the corpse, supporting the inference that he had progressed from theft to murder.

[5] See, for example, the prints "The Idle 'Prentice Executed at Tyburn" (1747) and "The Reward of Cruelty" (1751), in Uglow, *supra* note 4, at 449, 504. Uglow writes of the latter, "[T]he horror comes both from the corpse and from the way we are implicated, as spectators, with the doctors and polite visitors [observing the dissection of the corpse]." *Id.* at 505.

[6] Revenge is a recurring theme in literature of other ages, too. *See* RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 25-70 (1988). But writers in the nineteenth century became increasingly concerned with the inherent incommensurability of revenge and the concomitant serendipity of forgiveness. Wai Chee Dimock explores the way in which revenge becomes overdetermined and nonadequating, leaving literary artifacts or residues behind, in her discussion of *The Deerslayer* in RESIDUES OF JUSTICE: LITERATURE, LAW, PHILOSOPHY 54-56 (1996). While *The Merchant of Venice* and other works expose the injustice of unforgiving vengeance, its self-destructive consequences were explored in works like *Les Miserables* and *Moby Dick*. Still others exalted the redemption achieved by the equally incommensurate forgiveness by victims entitled to revenge, as in *The Man in the Iron Mask* or *Prometheus Unbound*.

Bennett's novels achieved tremendous popularity during his life, but his old-fashioned naturalism became the butt of Virginia Woolf's critique, and his reputation and popularity declined following his death. But recently his reputation has revived. Modern Library ranked *The Old Wives' Tale* eighty-seventh in its controversial (and premature) list of the 100 best novels of the twentieth century.[9] Publication of the list was preceded by a favorable article on Bennett in the *New York Times Book Review*.[10]

II. BENNETT AS LAWYER-AUTHOR

Bennett has been unfairly neglected. While his modernism may limit his appeal to postmodern critics, he continues nevertheless, like Kipling, to attract new readers. Moreover, Bennett is of particular interest to legal scholars because like Fielding, Goethe, Balzac, Hugo, Kafka, Clarin[11]—and graduates of the

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[7] JAMES JOYCE, ULYSSES 249-55 (Hans Walter Gabler et al. eds., Random House 1986) (1922). The bulk of this passage comprises a parody of newspaper reportage of the savage public execution of Robert Emmet in 1803. *See also* DON GIFFORD WITH ROBERT J. SEIDMAN, "ULYSSES" ANNOTATED: NOTES FOR JAMES JOYCE'S "ULYSSES" 333-34 (2d rev. ed. 1988).

[8] Postmodern critics might be startled by my coupling of Joyce and Bennett. Last year when I told my father of my interest in Bennett, he wrote me that "Bennett, Kipling, and Tennyson were three names that were not to be mentioned at Harvard [English Department] when I was a student [in the 1930s]." Letter from Harry M. Hoffheimer to the author, November 1997.

[9] Modern Library has posted its list at www.randomhouse.com/modernlibrary/100best. The release of the list in 1998 generated much controversy. *See, e.g.*, Erica Jong, *I've Got a Little List*, THE NATION, Nov. 16, 1998, at 32; Anna Mulrine, *Are the 100 Best Books by and for the Geritol Set?*, U.S. NEWS & WORLD REPORT, Aug. 3, 1998 <http://www.usnews.com/usnews/issue/980803/3book.htm>.

[10] Wendy Lesser, *Who's Afraid of Arnold Bennett?*, THE NEW YORK TIMES BOOK REVIEW, Sept. 28, 1997, at 39.

[11] *See generally* Michael H. Hoffheimer, *Law and Legal Education as a Hotbed*

University of Mississippi School of Law like John Grisham[12] and Wylene Dunbar[13]—Bennett provides a prominent example of a legally trained novelist.

Bennett was born in 1867 in the center of the pottery manufacturing district in Staffordshire in one of the towns known as the Five Towns or Potteries. These towns have since been amalgamated into the single town of Stoke-upon-Trent. In 1870 Bennett's father came into an inheritance that enabled him to pursue the ambition of becoming a solicitor. While Bennett was still a young child, his father articled himself, finally qualifying as a solicitor in 1876 when Bennett was nine.[14]

Bennett was the oldest child. He was bothered by a lifelong stammer for which he repeatedly sought treatment as an adult. He worked the stammer for stylistic effect into his conversation.[15] Margaret Drabble, in her biography of Bennett, views the stammer as the product of an "over-demanding and dominating father."[16]

Bennett left school at the age of sixteen upon passing the Local Examination. Instead of proceeding to high school and on to university, Bennett went to work in his father's law office.[17] Unlike his father, however, Bennett did not aspire to a career

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for the Novel: The Case of Goethe, 44 WAYNE L. REV. 1-27 (1998) (discussing novels by Goethe, Fielding, Balzac, Hugo, and Clarin).

[12] Novels by John Grisham regularly incorporate legal characters and legal themes. *See, e.g.*, TESTAMENT (1999), THE STREET LAWYER (1998), THE PARTNER (1997), THE RUNAWAY JURY (1996), THE RAINMAKER (1995), THE CHAMBER (1994), THE CLIENT (1993), THE PELICAN BRIEF (1992), THE FIRM (1991), A TIME TO KILL (1989).

[13] Dunbar's MARGARET CAPE: A NOVEL (1997) incorporates both legal characters and legal themes in the plot. She is currently writing a second novel tentatively entitled MY LIFE WITH CORPSES.

[14] MARGARET DRABBLE, ARNOLD BENNETT 25-26 (rev. ed., Penguin Books 1985) (1974).

[15] His friend H.G. Wells recalled: "The stammer he had never been able to conquer was utilized for a conversational method of pauses and explosions. He invented a sort of preliminary noise like the neigh of a penny trumpet." H.G. WELLS, EXPERIMENT IN AUTOBIOGRAPHY: DISCOVERIES AND CONCLUSIONS OF A VERY ORDINARY BRAIN (SINCE 1866) 540 (1934).

[16] *See* DRABBLE, *supra* note 14, at 33. H.G. Wells and others thought the stammer a result of a traumatic sexual experience in infancy. *Id.*

[17] *Id.* at 39, 42.

in law. He passed the entrance exam and entered the University of London as a law student, but he failed to obtain a law degree.[18]

Drabble paints a dreary picture of Bennett's years as clerk and law student, full of dull work by day and boring study by night.[19] Bennett's distaste for the law left its mark in his fiction. In one scene in the *The Old Wives' Tale*, the "law" (in the form of a bailiff) comes to attach some furniture. Even before we learn of the law's unpleasant business, we are repulsed by its smell: "[T]he law emitted an odour—the odour of uncleanliness on a hot August day."[20] As a clerk, Bennett would have engaged routinely in the sort of drafting that completed the repurchase of the furniture and discharged the lien. In the novel, such drafting is described with scorn: "There was much conferring upon forms of words, and flourishing of pens between thick, vile fingers, and scattering of ink."[21]

Bennett apparently read little literature during his early years, but he learned shorthand, and the skill enabled him to secure a position with a firm of solicitors in London in 1889.[22] In London he became a great bibliophile and absorbed the works of French and Russian realism.[23] He began publishing successful stories. In 1893 he left the law firm for a position as assistant editor of *Woman* magazine.[24] Within a few years he published his first novel and was making his first of many trips to the Continent.

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[18] *Id.* at 42. As Bennett tells it:

> I had matriculated at London University three years before, and was then working, without heart, for a law degree (which I never won); instead of Ouida my nights were given to Austin's Jurisprudence, the Institutes of Justinian and of Gaius, and Maine's Ancient Law; the last is a great and simple book, but it cannot be absorbed and digested while the student is pre-occupied with the art of fiction.

ARNOLD BENNETT, THE TRUTH ABOUT AN AUTHOR 22 (new ed. 1911). Bennett first published this literary autobiography (which follows his career up to his move to the country and publication of his first novel) in 1903.

[19] DRABBLE, *supra* note 14, at 42.

[20] ARNOLD BENNETT, THE OLD WIVES' TALE 395 (new ed., Doubleday & Co. 1911) (1908).

[21] *Id.* at 399. Drabble discusses other negative depictions of lawyers in Bennett's fiction that are based on even more plausibly autobiographical sources. *See* DRABBLE, *supra* note 14, at 43.

[22] *Id.* at 44-45.

[23] BENNETT, THE TRUTH ABOUT AN AUTHOR, *supra* note 18, at 31-34, 38, 47.

When he observed that most successful writers seemed to live outside London, he moved for a few years to the Bedfordshire countryside.[25] Then he took up residence for eight years in Paris where he wrote *The Old Wives' Tale*, completed on August 30, 1908 after eight months. Bennett was convinced the novel would establish his reputation as a major writer, and, despite slow initial sales, he was right. Praised by critics,[26] the novel gradually won a large and enduring readership, appearing in multiple editions down to the present.[27]

By the time of his death in 1931 (from drinking tap water abroad), Bennett had published thirty novels and extensive criticism.[28] Though his own style was planted firmly in nineteenth-century realism, he welcomed the works of Joyce, Faulkner, and others.

III. CAPITAL PUNISHMENT IN *THE OLD WIVES' TALE*

A. *Overview*

The Old Wives' Tale opens in the mid-1800s. Two young girls, Constance and Sophia Baines, are the only daughters of the town's most prominent draper. Their family lives above the store on the town square at the center of Bursley, the oldest and most self-important of the Five Towns or Potteries.

The novel is organized into four parts. Part I ("Mrs. Baines") recounts Constance's and Sophia's childhood together in Bursley. Part II ("Constance") describes Constance's early adult years. Constance stays at her family home in Bursley, marrying her father's shop assistant who takes over and modernizes the family business. They have a son, whom Constance spoils, and who proves to be artistically talented but restless. As an adult he neglects his mother, makes mysterious appointments (possibly homosexual liaisons), and achieves no real success in the world of art.

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[24] DRABBLE, *supra* note 14, at 55. He published work by Henry James, Thomas Hardy, and through a review of a work by H.G. Wells began a life-long friendship. *Id.* at 58-59.

[25] "When you live two and a half miles from a railway you can cut a dash on an income which in London spells omnibus instead of cab." BENNETT, THE TRUTH ABOUT AN AUTHOR, *supra* note 18, at 147.

[26] DRABBLE, *supra* note 14, at 155-58.

[27] *See generally* Margaret Harris, *Introduction* to ARNOLD BENNETT, THE OLD WIVES' TALE (Margaret Harris ed., Oxford Univ. Press 1995) (1911).

[28] DRABBLE, *supra* note 14, at 346, 348.

Part III ("Sophia") follows Sophia's elopement and flight from Bursley to Paris. There she soon learns that her husband is a good-for-nothing. Separating from him, she refuses to return to England or to have any communication with her sister. Eventually, she establishes a successful, fashionable boarding house in Paris.

In Part IV ("What Life Is"), Constance discovers her sister's whereabouts and persuades her to return to Bursley. The two spend their last years together in intimate strife until their deaths in the first decade of the twentieth century.

B. Constance

Executions play important parts in the lives of both Constance and Sophia. One night, nearly twenty years after Constance's marriage to her father's assistant, her husband Samuel Povey is awakened by his neighbor and cousin Daniel Povey. Samuel follows Cousin Daniel home where Daniel reveals that he has killed his wife. He did so in a fit of rage brought about by her secret drinking and neglect of their injured son. Samuel is revolted more by his cousin's wife's failings than by his cousin's crime:

> She was vile. . .the dishonour of her sex, her situation, and her years. She was a fouler obscenity than the inexperienced Samuel had ever conceived. And by the door stood her husband, neat, spotless, almost stately, the man who for thirty years had marshalled all his immense pride to suffer this woman. . .[29]

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[29] BENNETT, THE OLD WIVES' TALE, *supra* note 20, at 225. From the start, Samuel is put off and humbled by "the pomposity of legal etiquette," and by routine processing of the case that failed to appreciate the individual circumstanc-

Samuel devotes himself singlemindedly to "a mission, religious in its solemn intensity, to defend and save Daniel." As the town forgets his cousin, Samuel's zeal grows to monomania, resulting in the neglect his business and his health.[30] Despite all of his efforts, Daniel is convicted of murder, sentenced to death, and eventually executed.[31] Samuel spends most of the day of the execution in bed, exhausted, but he goes out briefly to help organize a demonstration, contracts pneumonia, and dies soon afterwards.[32]

Though Samuel sees his cousin at his trial and again prior to his execution, the narrator does not describe these encounters. The last image of Daniel in the novel remains his disappearance from public view after his arrest. On that occasion the narrator intrudes to make explicit the way that non-public legal proceedings cheat the audience of the spectacle of a public sacrifice:

> And Daniel—to his cousin a sort of Christ between thieves—was hurried past the privileged loafers in the corridor, and down the broad steps. A murmuring wave agitated the crowd. . . . And Daniel and his guardians shot through the little living lane. Quick! Quick! For the captive is more sacred even than a messiah. The law has him in charge! And like a feat of prestidigitation Daniel disappeared into the blackness of the van. A door slammed loudly, triumphantly, and a whip cracked. The crowd had been balked. It was as though the crowd had yelled for Daniel's blood and bones, and the faithful constables had saved him from their lust.[33]

The crowd, Samuel, and Constance, as well as the reader, are

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es of Cousin Daniel: "After all, Daniel was not a murderer; his wife's death was due to accident, was simply a mishap." *Id.* at 230.

[30] *Id.* at 233.

[31] Though the jury recommends mercy and the entire town supports his cause, the Home Secretary denies a petition to commute the sentence when, after a sleepless night, his sense of duty prevails over his humane instincts. *Id.* at 241, 245-46.

[32] *Id.* at 251-52.

[33] *Id.* at 232.

excluded from observing the execution.

C. Sophia

This secluded private execution contrasts with the public execution witnessed by Sophia. After arriving in Paris soon after her elopement, her husband announces abruptly that he plans to go to Auxerres where a public guillotining is scheduled. Sophia resists accepting her husband's motives:

> "Not to see the execution?" she stammered.
> "Why not? I've always wanted to see an execution, especially with the guillotine. And executions are public in France. It's quite the proper thing to go to them."

He becomes angry when she asks about his reasons:

> "But why do you want to see an execution?"
> "It just happens that I do want to see an execution. It's a fancy of mine, that's all. I don't know that any reason is necessary," he said. . . .
> She was aghast. "And shall you leave me here alone?"[34]

Faced with the alternative of being abandoned alone in a strange country, Sophia accompanies her husband to Auxerres. When she tries to justify her husband's morbid curiosity to a French acquaintance, he responds: "As a psychological experience. . . it will be very interessant. . . . To observe one's self, in such circumstances. . ." Sophia's reaction further underscores the observation of the observer: "She thought how strange even nice Frenchmen were. Imagine going to an execution in order to observe yourself!"[35]

The presentation of events leading up to the execution is embroidered with scenes of eating. And the atmosphere is sexually charged. Sophia first learns of the pending execution by overhearing conversations at a restaurant in Paris.[36] In Auxerres she is repulsed by the prospect of fellow diners at the hotel who have come to view the execution: "The faces, to the youngest, were brutalized, corrupt, and shameless."[37] She is troubled especially by the sexual license unleashed in the crowd, older men kissing younger women companions at the table.[38] Dinner conversation "was exclusively about assassinations, executions, criminals, and executioners."[39] The fascination with details of killing is accompanied by a prurient interest in sexual activity.[40] And the diners express "sincere idolatry" for the killer who was to be executed the following day.[41]

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[34] *Id.* at 325-26.
[35] *Id.* at 326.
[36] *Id.* at 312.

Confronted by the open display of sadism and lust at this dinner, Gerald drops his "pose of a calm, disinterested, scientific observer of humanity." Ashamed of exposing Constance "to the view of such an orgy," he himself refuses to look upon her: "[H]is restless glance carefully avoided both Sophia and [their French companion] Chirac."[42]

After dinner, Sophia returns to her room where she lies alone on the bed, partly unclothed. She continues to take in sounds from fellow travelers in the hotel that vaguely mingle pain and sexual pleasure: "long sighs suddenly stifled; mysterious groans as of torture, broken by a giggle."[43] These sounds are drowned out by the roar of the crowd in the square that announces the construction of the guillotine.

Sophia is not able to resist observing the crowd observing the construction: "She resisted. She said to herself that he idea was absurd, that she did not *wish* to go to the window. Nevertheless, while arguing with herself, she well knew that resistance to the thought was useless and that ultimately her legs would obey its command."[44] From her window she looks out on the crowd. In the crowd she sees Gerald and Chirac strolling arm-in-arm with two women. She later loses sight of him and still later sees him reappearing furtively with the woman from another dwelling. She does not suspect (as the reader does) that he has had a sexual encounter with a prostitute.[45]

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[37] *Id.* at 331.

[38] *Id.*

[39] *Id.* at 332.

[40] One diner tells the story of how a courtesan visited a condemned man on the night before his execution. *Id.* at 332.

[41] *Id.* at 332.

[42] *Id.* at 333.

[43] *Id.*

[44] *Id.* at 333-34.

The crowd's clamor intensifies with the construction of the guillotine. Singing and cheering accompany each test of the blade. Looking out on the crowd, Sophia sees many other women (like her) gazing at the crowd from windows, though (unlike her) they clap approvingly. She hears people at windows of her hotel looking out on the square but will not lean out the window to look at them because to do so will expose her to their gaze: "She could not see the people at the neighboring windows without showing her own head, and this she would not do."[46]

When she loses sight of Gerald in the crowd, she ironically thinks he may be returning to the room. She accordingly returns to her bed and resolves to say in bed until "it's all over" and Gerald returns.[47]

She falls asleep until awakened by "a tremendous shrieking, growling, and yelling: a phenomenon of human bestiality" far surpassing anything she had experienced.[48] Even while resolving to stay in bed, she rises and goes to the window, staring "greedily" at the square where she observes the spectators. They "gazed in a fixed and sinister enchantment at the region of the guillotine, as Sophia gazed."[49] While telling herself "I cannot stand this!" she is unable to move: "[S]he could not move even her eyes."

The overpowering attraction of the execution conflicts with the horror and disbelief she had expressed upon first learning of the public execution.[50] Unable to move while the prisoner is

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[45] *Id.* at 335-37.

[46] *Id.* at 335.

[47] *Id.* at 337.

[48] *Id.* at 337.

[49] *Id.* at 337.

[50]

> "What are they talking about?"
>
> "They're talking about the execution of the murderer Rivain that takes place at Auxerre the day after to-morrow. They're arranging to

led to the guillotine, she collapses only upon hearing the "clicking noise" of the decapitation. At the same time, the frenzy of the crowd climaxes.

D. EPILOGUE

There are striking similarities between the two executions. In each case, one of the sister's spouses becomes fixated upon the execution. For Samuel, saving his cousin from execution becomes a "monomania." For Gerald, observing a public execution becomes a "great ambition."

Both executions serve a similar function in propelling the plot, establishing each sister's independence from her spouse. Samuel dies as a result of his monomania, and his death forces Constance to become economically independent; she eventually sells the store but retains the adjacent residence. Gerald's "great ambition" together with various lies that he makes during the excursion to view the execution force Sophia to acknowledge his loathsome character and to recognize her serious economic insecurity. As a result, when Gerald returns, exhausted from viewing the execution, and falls asleep, Sophia removes a quantity of banknotes from him. These secret funds provide sufficient financial security so that she later allows her husband to abandon her.

Yet, despite similarities, the executions have significantly different effects. With the removal of Samuel's cousin from view, from Constance's gaze, his nonpublic execution provides neither intense pleasure nor pain for Constance. Only Samuel seems deeply touched by the fate of his cousin, and Constance's only real concerns are with her husband's "unhinged" mental state, his "hysteria" leading to the neglect of his family, his

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make up a party and go and see it."

"Oh, what a horrid idea!" said Sophia.

"Guillotine, you know!" said Gerald.

"But can peoples see it?"

"Yes, of course."

"Well, I think it's horrible."

"That's why people like to go and see it."

Id. at 312.

business, and his own health.[51] The execution date coincides with Samuel's medical crisis, but the execution itself is never mentioned, described, or alluded to.

In contrast, the reader's view of the execution witnessed by Sophia is intensified by her own observation of herself and other observers. Just as she observes the mixture of pleasure (specifically sexual pleasure) and blood lust among the spectators, the reader, too, is presented with the alluring spectacle of the partially clothed Sophia on the bed, rising and going to the window, concealing herself from the sight of all—but made visible to the reader. And through Sophia, the reader, too, is drawn irresistibly to the window to gaze upon the public execution.

When Sophia's body collapses with the click of the decapitation, both she and the reader are separated from the climactic cries of the crowd. The pleasure of its blood lust has been shared, but detachment is restored by the process of turning the observing eye from the body of the criminal to the crowd, from the crowd to Sophia, and from Sophia back at last to the narrator and reader.

This critical distancing coincides with Sophia's collapse—the self-destructive consequence of indulging the pleasures of watching the killing. And distance is restored artfully by the narrator who intrudes with the ironic observation, "Justice was done. The great ambition of Gerald's life was at last satisfied."[52]

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[51] *Id.* at 250

[52] *Id.* at 339. Bennett's description of the public execution convinced some readers the experience must have been autobiographical. This inference must have troubled Bennett, for he added a Preface after the first edition, denying that he had ever been present at an execution and thus further distancing himself from the narrator. *See Preface*, THE OLD WIVES' TALE, at ix.

MISSISSIPPI UNINSURED MOTORIST LAW—WHERE DO WE GO FROM HERE?

Michael V. Cory, Jr.[*]
Lanny R. Pace[**]

I. INTRODUCTION

Uninsured Motorist insurance in Mississippi is governed by the uninsured motorist statutes enacted by the Mississippi Legislature (sections 83-11-101 to 83-11-111 of the Mississippi Code) and interpreted and applied by the Mississippi Supreme Court.[1] In reviewing the numerous court opinions that have followed since the enactment of these statutes, it is apparent that perhaps no statutory scheme has been as stretched and twisted in its interpretation and application. Since the enactment of this statutory scheme, many of the court's interpretive decisions appear to have little to do with the principles of statutory construction and *stare decisis*. Rather than interpreting and applying the statutory language as written, over the years the Mississippi Supreme Court has complicated and materially altered the scope and reach of this legislation.[2]

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[**] Lanny R. Pace, Steen Reynolds & Dalehite; University of Mississippi (B.B.A. 1983; J.D., magna cum laude, 1994).

[1] *See* MISS. CODE ANN. §§ 83-11-101 to 83-11-113 (1999). For a history of the UM Act, see generally *Rampy v. State Farm Mut. Auto. Ins. Co.*, 278 So. 2d 428, 432 (Miss. 1973), which explains that the Mississippi Uninsured Motor Vehicles Act came into existence in 1956 at the behest of insurance companies in an effort on the part of the automobile insurance industry to alleviate some of the problems associated with rapidly increasing number of uninsured vehicles. *See also* Richard T. Phillips, *A Guide to Uninsured Motorist Law in Mississippi*, 52 MISS. L.J. 255 (1982) (examining history of Uninsured Motorist Act in Mississippi).

[2] As the Fifth Circuit Court of Appeals observed, "[t]he Mississippi Supreme

In surveying the body of authority interpreting the uninsured motorist statutes, it is apparent that the impetus underlying many of the court's decisions is the court's admitted desire to protect the injured insured. However, taken as a group the result has been (1) a judicial intrusion into the province of the legislature, (2) an erosion of the right to contract, and (3) such a confused state of the law that both lawyers and policyholders frequently struggle to determine if uninsured motorist coverage is even implicated.[3] It is also safe to assume that insurers have responded to these decisions the same as would any other business: by raising the premiums charged to whatever amount is necessary to cover the increased risk and exposure that has resulted from these decisions.

In light of the complicated and sometimes confusing current state of Mississippi's uninsured motorist law, this article will attempt to (1) provide a reliable guide for the practitioner when faced with the most common uninsured motorist questions, (2) discuss certain unresolved issues, and (3) set forth potential solutions where the current uninsured motorist law is particularly complicated or confusing.

II. WHAT IS UNINSURED MOTORIST COVERAGE?

Uninsured motorist coverage is a type of first-party insurance coverage designed to compensate the insured (up to the coverage limits chosen) for damages caused by the driver of an uninsured or underinsured motor vehicle. In Mississippi, uninsured motorist coverage is required by statute to be offered with all bodily injury liability policies.[4] A motor vehicle is

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Court has applied a relatively thick coat of judicial gloss to the UM Act." Boatner v. Atlanta Specialty Ins. Co., 115 F.3d 1248, 1253 (5th Cir. 1997).

[3] This is partly because the principal of stacking is somewhat counter intuitive. A typical policyholder with more than one vehicle would not necessarily assume or understand that he actually has (and is actually paying for) more uninsured motorist coverage than what is specified on the declarations page. Further, the insured should not be expected to understand why one type of coverage stacks while another does not.

[4] *See* MISS. CODE ANN. § 83-11-101 (1999); State Farm Mut. Auto. Ins. Co. v.

considered to be uninsured/underinsured when the bodily liability coverage on that vehicle is less than the uninsured motorist coverage available to the insured.[5] The fundamental purpose of uninsured motorist coverage is to protect innocent insureds and their guest passengers from injuries caused by financially irresponsible drivers and to provide these innocent persons with the same opportunity to obtain compensation as they would have had in the event the negligent driver had been covered by a standard automobile liability insurance policy.[6]

Uninsured motorist coverage is normally available in two situations: (1) when the tortfeasor's vehicle is uninsured (i.e., has no bodily injury liability insurance), or (2) when the tortfeasor's vehicle is underinsured (i.e., when the liability coverage carried on the tortfeasor's vehicle is less than the injured insured's available uninsured motorist coverage).[7] Determining whether a tortfeasor is uninsured under Mississippi law is generally a straightforward proposition. A tortfeasor is considered uninsured (1) when the tortfeasor's vehicle has no liability insurance coverage in effect at the time of the accident,[8] (2) when the tortfeasor had liability insurance in effect at the time of the accident but coverage is subsequently denied by the insurer in writing,[9] (3) when the tortfeasor has liability coverage in effect at the time of the accident but the insurer becomes insolvent within twelve months after the accident and is unable to pay,[10] (4) when the owner or operator of the vehicle is unknown and there is "actual physical

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Nester, 459 So. 2d 787, 781 (Miss. 1984), *overruled on other grounds by* Burns v. Burns, 518 So. 2d 1205 (Miss. 1988).

[5] *See* Fidelity & Guar. Underwriters, Inc. v. Earnest, 699 So. 2d 585, 589 (Miss. 1997).

[6] *See Rampy,* 278 So. 2d at 432. As the *Rampy* court explained "the vast majority of jurisdictions have stated that the purpose of such uninsured motorist laws is to provide protection to innocent insured motorists and passengers injured as a result of the negligence of financially irresponsible drivers." *Id.*

[7] *See* MISS. CODE ANN. § 83-11-103(c)(i), (iii) (1999).

[8] *See* § 83-11-103(c)(i).

[9] *See* § 83-11-103(c)(ii).

[10] *See id.*

contact" between the vehicle "and the person or property of the insured,"[11] or (5) when the tortfeasor is self insured.[12]

A tortfeasor's vehicle will not become uninsured in situations where the tortfeasor's liability limits are exhausted as a result of payments to multiple injured claimants.[13] So long as the tortfeasor's liability limits are equal to or greater than the injured insured's uninsured motorist coverage, the injured insured's uninsured motorist coverage is not available to him even if the injured insured does not receive any of the proceeds from the liability coverage.[14] A tortfeasor's vehicle will also not qualify as an uninsured motor vehicle if it is "owned by the United States government" and a claim can be made "under the Federal Tort Claims Act."[15]

III. INTERPRETING MISSISSIPPI'S UNINSURED MOTORIST STATUTE AND THE UNINSURED MOTORIST INSURANCE CONTRACT

When interpreting other Mississippi statutes the Mississippi Supreme Court has followed several maxims: (1) the construction should give effect to the intent or purpose of legislature,[16] (2) where the statute is clear and unambiguous, there should be no occasion to construe the statute and the meaning cannot be restricted or enlarged,[17] (3) the court should give effect to the purpose and policy that the legislature has in view, even if beyond the letter of the law or against grammatical construction,[18] (4) unthought of results must be avoided if possible,[19] (5) all consequences should be considered,[20] (6) there is a presumption of no exceptions unless clearly expressed in the statute,[21] (7) popular words must be accepted in their popular sense,[22] and (8) that which is implied is as much a part of the statute as that which is expressed.[23]

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[11] § 83-11-103(c)(v).

[12] *See* Perry v. Nationwide Gen. Ins. Co., 700 So. 2d 600, 601 (Miss. 1997) (holding that plan of self-insurance is not "insurance" for purposes "of determining whether tortfeasor is 'uninsured' motorist under terms of our Uninsured Motorist Act").

[13] *See* Cossitt v. Federated Guar. Mut. Ins. Co., 541 So. 2d 436, 440 (Miss. 1989).

[14] *See* Washington v. Georgia Am. Ins. Co., 540 So. 2d 22, 25 (Miss. 1989) (explaining that how liability coverage is distributed among injured claimants is of no moment to this equation).

[15] MISS. CODE ANN. § 83-11-103(c) (1999).

[16] *See* Harrison County Sch. Dist. v. Long Beach Sch. Dist., 700 So. 2d 286, 289 (Miss. 1997) (explaining that court's goal is to fulfill legislative intent).

[17] *See Harrison County Sch. Dist.*, 700 So. 2d at 288-89 (explaining that for unambiguous statutes court should interpret its plain meaning without aid of principles of statutory construction); Marx v. Broom, 632 So. 2d 1315, 1318 (Miss. 1994); State v. Heard, 151 So. 2d 417, 419 (Miss. 1963) (deciding that statutes

The court's construction of the Uninsured Motorist statutes, however, has relied more on the stated goal of protecting the injured person and this underlying public policy than on the traditional rules of statutory construction. The court on numerous occasions has reasoned that the basis of its statutory construction of the uninsured motorist statutes is that these statutes are remedial in nature and therefore should be construed broadly.[24] This overriding rule, along with the court's rules that ambiguities in the insurance policies must be construed in favor of the injured insured and that any policy provisions conflicting with the statute are trumped by the statute, have resulted in the present state of Mississippi uninsured motorist law.[25]

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that clearly define intent of legislature are not subject to judicial construction).

[18] *See* Evans v. Boyle Flying Serv., Inc., 680 So. 2d 821, 825 (Miss. 1996).

[19] *See Evans*, 680 So. 2d at 825.

[20] *See* Chandler v. City of Jackson Civil Serv. Comm'n., 687 So. 2d 142, 144-45 (Miss. 1997).

[21] *See Heard*, 151 So. 2d at 420.

[22] *See Chandler*, 687 So. 2d at 144; Buelow v. Kemp Co., Inc., 641 So. 2d 1226, 1228-29 (Miss. 1994) (stating that courts presume legislature assigns common meaning to words in statutes).

[23] *See* City of Jackson v. Craft, 36 So. 2d 149, 152 (Miss. 1948).

[24] *See* Atlanta Cas. Co. v. Payne, 603 So. 2d 343, 345-46 (Miss. 1992) (stating that uninsured motorist statute was intended to be remedial, thus broadly construed); Stevens v. United States Fid. & Guar. Co., 345 So. 2d 1041, 1043 (Miss. 1977).

[25] *See Payne*, 603 So. 2d at 345-46.

IV. STACKING

A. *What Is Stacking?*

In the uninsured motorist context, the term "stacking" basically stands for the proposition that the amount of uninsured motorist limits available to an injured insured is determined by adding together the uninsured motorist coverages applicable to each vehicle insured by the injured insured.[26] The basic principle underlying the concept of stacking is that the insured should get the benefit of all coverage that was paid for by the insured.[27]

In uninsured motorist cases, state courts that allow stacking frequently focus on whether a separate premium was charged for the coverage on each vehicle.[28] If a separate premium was charged, then these courts generally allow stacking regardless of any limiting language in the insurance policy.[29] Other courts do not consider the fact that a separate premium is charged to be determinative when there is unambiguous language in the policy clearly precluding stacking.[30] These courts often take into consideration factors such as whether a discounted premium is charged for each additional vehicle and whether the premium charged is sufficient to warrant the stacked coverage sought by the injured insured.

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[26] For example, if an injured insured has three vehicles on her policy or three vehicles insured under three separate policies, and each vehicle has uninsured motorist coverage in the amount of $50,000 per person and $100,000 per occurrence, then the total uninsured motorist benefits available would be $150,000 per person and $300,000 per occurrence.

[27] *Black's Law Dictionary* defines stacking as, "the ability of insured, when covered by more than one insurance policy, to obtain benefits from second policy on same claim when recovery from first policy alone would be inadequate." BLACK'S LAW DICTIONARY 1490 (6th ed. 1990).

[28] *See* Werley v. United Servs. Auto Ass'n, 498 P.2d 112, 119 (Alaska 1972) (holding that stacking was allowed where three separate premiums were paid).

[29] *See* Southwestern Fire & Cas. Co. v. Atkins, 346 S.W.2d 892, 895 (Tex. 1961) (allowing stacking where separated premiums had been paid for insurance on two vehicles); *Werley*, 498 P.2d at 119. *See also* Maid v. Illinois Farmers Ins. Co., 428 N.E.2d 1139, 1140-41 (Ill. 1981) (allowing stacking where separate premiums were paid under each policy); Kemp v. Allstate Ins. Co., 601 P.2d 20, 24 (Mont. 1979) (holding that stacking was permitted where separate premium was charged and collected on motor vehicles).

[30] *See* Cheseroni v. Nationwide Mut. Ins. Co., 410 A.2d 1015, 1016 (Del. 1980) (holding that fact that coverage is available by two alternative policies' clauses does not increase amount of liability); Johnson v. Travelers Indem. Co., 269 N.E.2d 700, 701 (Mass. 1971) (stating that clause limiting amount of liability was unambiguous, and, thus controlling).

B. Two Concepts That Are Helpful in Understanding Stacking

In order to understand the current law of stacking in Mississippi, the practitioner should understand two concepts: (1) the difference between "Class I insureds" and "Class II insureds" and (2) the difference between "intra-policy stacking" and "inter-policy stacking."

1. The Difference Between "Class I Insureds" and "Class II Insureds"

The right of the injured to stack depends in part on the relationship between the insured and the insurance policy from which coverage is sought. Like most states, Mississippi recognizes two distinct classes of insured: "Class I insureds" and "Class II insureds."[31] The particular class that the injured insured is in is important because it directly affects whether uninsured motorist coverage is exposed as well as the question of how much coverage is available to compensate the injured insured.

The Mississippi Legislature has defined Class I as the "named insured and, while resident of the same household the spouse of any such named insured and relatives of either while in a motor vehicle or otherwise."[32] Based on this definition, Class I insureds are covered by their uninsured motorist coverage at all times.[33] In other words, Class I insureds receive the benefit of their uninsured motorist coverage whether injured in their own vehicle, in another's vehicle (whether insured or not), or while a pedestrian.[34] The Mississippi Legislature defined Class II insureds as permissive users of and guest passengers in a Class I insured's vehicle.[35] Therefore, Class II insureds are only covered when they can be said to be using the Class I insured's automobile.[36] Based on the difference between these statutory definitions, the coverage available to a Class II insured is more limited than that available to a Class I insured.

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[31] Meadows v. Mississippi Farm Bureau Ins. Co., 634 So. 2d 108, 110 (Miss. 1994).

[32] MISS. CODE ANN. § 83-11-103 (1999).

[33] The legislature provided that Class I insureds are covered "while in a motor vehicle or otherwise. . . ." § 83-11-103(b).

The practitioner should also be aware that a person can be both a Class I and Class II insured at the same time under different policies. For example, if a person who has his own uninsured motorist coverage is injured while in or using another person's vehicle, which also has uninsured motorist coverage, then the injured person would be a Class I insured under his own policy and a Class II insured under the policy covering the vehicle he was in or using at the time of the accident.

2. The Difference Between "Intra-policy Stacking" and "Inter-policy Stacking"

Certain insurance companies will insure all of an insured's vehicles under a single insurance policy while other companies will issue a separate policy for each vehicle to be covered. Intra-policy stacking is the stacking of the uninsured motorist coverages on each vehicle listed on the declarations page of a single policy. Inter-policy stacking is the stacking of the uninsured motorist coverage on vehicles covered under separate polices (whether issued by the same or different insurers). Depending on the law of the state where the policy is issued, whether an insured's vehicles are insured under a single policy or under separate policies can have a significant effect on an insured's ability to stack the coverages.[37]

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[34] *See* Brown v. Maryland Cas. Co., 521 So. 2d 854, 856 (Miss. 1987) (stating that "the first class, *i.e.* Class 1, named insureds, is afforded liberal coverage extending to all circumstances when a member of the first class is injured by an uninsured motorist"); Stevens v. United States Fidelity & Guar. Co., 345 So. 2d 1041, 1043 (Miss. 1977) (explaining that coverage available to Class I insured "against injury inflicted by uninsured motorist is quite liberal, extending to all circumstances when a member of the first class is injured by an uninsured motorist"). *But see* Wickline v. United States Fidelity & Guar. Co., 530 So. 2d 708, 714 (Miss. 1988) (holding that there is no natural law definition of insured in uninsured motorist law).

[35] The exact statutory language defining Class II insureds is "any person who uses, with the consent . . . of the named insured, the motor vehicle to which the policy applies, and a guest in such motor vehicle . . . ." § 83-11-103(b). Class II insureds are typically friends and neighbors riding in or borrowing the named insured's vehicle. As such, they are the gratuitous beneficiaries of the coverage purchased by the insured.

[36] Exactly when a potential Class II insured is "in" or "using" the insured vehicle has generated a number of interesting opinions which are discussed in section V of this article.

C. The Current "Stacking" Law in Mississippi

The Mississippi Supreme Court currently recognizes a distinction between "stacking for the purpose of establishing the insured vehicle as uninsured, . . . [and] stacking for the purpose of recovering damages."[38] This distinction is not normally important in situations where the tortfeasor's vehicle carries no liability coverage since any available uninsured motorist coverage would obviously be triggered. However, the question becomes more difficult when the tortfeasor's vehicle has some liability coverage but in an amount that may not be sufficient to fully compensate the injured insured.[39]

1. Stacking To Establish the Tortfeasor's Vehicle as Underinsured

When the tortfeasor's vehicle does carry liability coverage, the focus turns to whether the tortfeasor's vehicle is an underinsured vehicle as to the injured insured. Or in other words, does the injured insured's available uninsured motorist coverage exceed the liability limits on the tortfeasor's vehicle?[40] If the injured insured's uninsured motorist coverage is equal to or less than the tortfeasor's liability limits, then the tortfeasor's vehicle is not uninsured and no uninsured motorist coverage is available regardless of the severity of the injured insured's injuries.[41] But, if the liability limits are less, then the uninsured motorist coverage is exposed with certain limitations discussed later in this article.

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[37] *See* Cossitt v. Federated Guar. Mut. Ins. Co., 541 So. 2d 436, 440 (Miss. 1989).

[38] State Farm Ins. Co. v. Davis, 613 So. 2d. 1179, 1183 (Miss. 1992)

[39] *See* Washington v. Georgia Am. Ins. Co., 540 So. 2d 22, 25-26 (Miss. 1989) (discussing decisions in various jurisdictions where liability coverage was insufficient to compensate injured insured fully).

In making this comparison between the tortfeasor's liability limits and the injured insured's uninsured motorist limits, Class I insureds are entitled to stack the coverages on each vehicle listed on each policy in which they qualify as a Class I insured.[42] It makes no difference whether these vehicles are insured under a single policy or under separate policies. It also does not matter how the premium is charged (i.e., whether lump sum premium or separate premiums), so long as the policy's declarations page shows that the vehicle has uninsured motorist coverage.[43]

If the Class I insured is also a guest passenger or permissive user in an insured vehicle at the time of the accident, then the Class I insured can stack her own coverages on top of any coverage on the insured vehicle she was using at the time of the accident. However, for purposes of qualifying the tortfeasor's vehicle as underinsured, the injured insured cannot stack the coverages on the owner's other vehicles regardless of whether the other vehicles are listed on a single policy or insured under separate policies.[44]

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[40] For purposes of establishing whether an insured host vehicle is in fact uninsured, the court looks no further than the guest passenger's own coverage and the coverage on the host vehicle. *See* Thiac v. State Farm Mut. Auto. Ins. Co., 569 So. 2d 1217, 1221 (Miss 1990).

[41] *See* Fidelity & Guar. Underwriters, Inc. v. Earnest, 699 So. 2d 585, 589-90 (Miss. 1997) (explaining that contrary construction is "not supported by the 'limits versus limits' language of UM statutes"); *Washington,* 540 So. 2d at 26 (stating that statute, as written, did not support uninsured motorist coverage where insured amount not sufficient). Some states construe uninsured motorist coverage as excess coverage thereby stacking the uninsured motorist coverage on top of whatever liability coverage is carried by the tortfeasor. *See* Brown v. Erie Ins. Co., 519 N.E.2d 408, 410 (Ohio 1986) (holding amount not covered under tortfeasor's coverage covered under underinsured coverage).

[42] *See* State Farm Mut. Auto. Ins. Co. v. Bishop, 329 So. 2d 670, 672-73 (Miss. 1976) (holding insurance company could not limit liability by not allowing stacking).

[43] *See* Harrison v. Allstate Ins. Co., 662 So. 2d 1092, 1094 (Miss. 1995) (refusing to preclude intra-policy stacking where separate premiums charged under guise of lump sum premium).

Class II insureds have a more limited right to stack coverages for the purpose of establishing the tortfeasor's vehicle as underinsured. The Class II insured is only entitled to compare the tortfeasor's liability limits with the uninsured motorist limits applicable to the vehicle he was using at the time of the accident. As discussed above, if the Class II insured also has his own uninsured motorist coverage (i.e., is also a Class I insured), then he may stack this coverage on top of the coverage on the vehicle he was using at the time of the accident. Class II insureds may not stack the uninsured motorist coverages from any of the owner's other vehicles.

2. *Stacking for the Purpose of Recovering Damages*

Once the tortfeasor's vehicle is established as underinsured, then for recovery of damages purposes, the Class II insured can stack the uninsured motorist coverage on any other vehicles insured under the same policy as the accident vehicle. In other words, once the tortfeasor's vehicle is established as underinsured, intra-policy stacking is available to the Class II insured. However, the Class II insured is still not entitled to stack the uninsured motorist coverage on the other vehicles owned by the owner of the accident vehicle when the other vehicles are insured under separate policies.[45] This distinction is based on the Mississippi Supreme Court's conclusion that the Class II insured does not meet the definition of an "insured" under the policies covering vehicles that he was not using at the time of the accident.[46] These same rules apply to the situation where a Class I insured is also a Class II insured by virtue of being a permissive user or guest passenger.

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[44] *See Thiac*, 569 So. 2d at 1221 (stating that to allow injured person to stack coverage for other automobiles of tortfeasor is contrary to legislative intent). It does not matter if the owner's other vehicles were listed on the same policy or a different policy.

[45] A guest passenger cannot stack uninsured motorist coverages under separate policies covering other vehicles. *See* Box v. State Farm Mut. Auto. Ins. Co., 692 So. 2d 54, 58 (Miss. 1997) (holding that it would be against public policy to allow person to stack her own coverage with other vehicles); Meadows v. Farm Bureau Ins. Co., 634 So. 2d 108, 111 (Miss. 1994) (limiting Class II coverage to automobile in which they were passengers at time of collision).

The following chart summarizes the relationships between the class of the insured and the type of stacking:

Stacking for purpose of qualifying
tortfeasor's vehicle as underinsured

	Class I Insureds	Class II Insureds
Inter-policy stacking	yes	no
Intra-policy stacking	yes	no

Stacking for purpose of determining
available coverage to compensate insured

	Class I Insureds	Class II Insureds
Inter-policy stacking	yes	no
Intra-policy stacking	yes	yes

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[46] *Thiac,* 569 So. 2d at 1221. *See Box,* 692 So. 2d at 58 (finding Class II insured without recourse because she did not meet definition of "insured").

3. History of Stacking in Mississippi

The first Mississippi case involving stacking of uninsured motorist benefits after the enactment of the uninsured motorist statutes appears to be the case of *Harthcock v. State Farm Mutual Automobile Insurance Co.*[47] In *Harthcock*, the court allowed a passenger on a motorcycle to stack the uninsured motorist coverage on the motorcycle on top of the passenger's own uninsured motorist coverage.[48] The court refused to allow the two insurers (the guest passenger's insurer and the motorcycle driver's insurer) to reduce the minimum limits provided by their policies through "other insurance clauses."[49]

In *Talbot v. State Farm Mutual Automobile Insurance Co.*,[50] the court in a 5 to 4 decision initially construed the uninsured motorist statutes so as to allow the insurer and insured to contract as they please with regard to any coverage over the minimum amount required by statute.[51] In *Talbot*, the insured had four vehicles insured under a single policy.[52] Separate premiums were charged for each coverage on each of the four vehicles.[53] The policy language attempted to preclude stacking by limiting the uninsured motorist coverage available to the minimum amount specified by the financial responsibility law.[54] The court based its decision on the plain language of section 83-11-111, which provides that "[a]ny policy . . . may also grant . . . coverage in excess of, or in addition to, coverage specified for a motor vehicle liability policy and the excess or additional coverage shall not be subject to the provisions of this article."[55]

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[47] 248 So. 2d 456 (Miss. 1971)

[48] *Harthcock*, 248 So. 2d at 461.

[49] *Id.* at 461-62. Section 83-11-101 of the Mississippi Code provides that uninsured motorist limits "shall be no less than those set forth in the Mississippi Motor Vehicle Safety Responsibility Law. . . ." MISS. CODE ANN. § 83-11-101 (1999). At the time of this opinion, the minimum limit prescribed by statute was $5,000.

[50] 291 So. 2d 699 (Miss. 1974), *abandoned by* Government Employees Ins. Co. v. Brown, 446 So. 2d 1002 (Miss. 1984).

[51] *Talbot*, 291 So. 2d at 701.

[52] *Id.* at 702.

[53] *Id.*

[54] *Id.* at 700.

The court also recognized that under the statute as written, there is "no requirement that the (uninsured motorist) coverage shall be more than the minimum thus stated."[56] Based on this statutory language, the court explained that the insurer and the insured are "free to contract as to uninsured motorist coverage in any respect so long as the required coverage is not cut down by the policy provision."[57] Responding to the argument that since separate premiums are charged the insured should be allowed to stack the coverages on each of his four automobiles, the Mississippi Supreme Court noted that "any person using any of the vehicles with Insured's permission is afforded coverage, so it cannot be successfully argued that no coverage was provided for the premiums paid."[58]

Probably the most interesting aspect of the *Talbot* decision, in retrospect, is that even the dissent conceded that "plain, unmistakable and certain" language could be used to preclude stacking.[59] There did not appear to be any doubt when this decision was handed down that based on the language of the statute, and on general contract law, insurers and insureds could limit any coverage over and above the statutory minimum limits. The dissent's primary concern was their belief that the specific limiting language combined with the fact that separate premiums were charged for the coverage on each vehicle was both ambiguous and "calculated to mislead" the insured.[60] The dissent reasoned that in this particular case the insured could have reasonably believed that he had four uninsured motorist coverages under the policy.[61]

In its next stacking decision, *Southern Farm Bureau Ca-*

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[55] MISS. CODE ANN. § 83-11-111 (1999). *See Talbot*, 291 So. 2d at 701 (holding that parties were free to contract as to excess coverage because by express terms of section 83-11-111 express coverage was not subject to its provisions).

[56] *Id.* at 701.

[57] *Id.*

[58] *Id.* at 702. The court appeared to recognize the fact that the greater the number of cars insured the greater the risk.

[59] *Id.* at 706 (Broom, J., dissenting).

[60] *Id.* (Broom, J., dissenting).

[61] *Id.* at 707 (Broom, J., dissenting).

sualty Insurance Co. v. Roberts,[62] the Mississippi Supreme Court condoned the practice of inter-policy stacking.[63] In *Roberts*, a Class I insured had three separate policies on three separate vehicles each providing for uninsured motorist coverage and charging a separate uninsured motorist premium.[64] The court allowed the Class I insured to stack the uninsured motorist coverage on each of the three vehicles, stating that the insured should receive what was paid for in each policy up to the full amount of damages or the coverage limit.[65] The court went on in this opinion specifically to reaffirm its holding in *Talbot* that the insurer and insured are free to limit coverage to the statutory minimum limit where there are multiple vehicles on a single policy (i.e. intra policy stacking).[66]

The Mississippi Supreme Court again reiterated the principles espoused in the *Talbot* decision in the case of *Hartford Accident & Indemnity Co. v. Bridges.*[67] In *Hartford*, the court again faced an insurer's attempt to preclude intra-policy stacking.[68] A Class I injured insured had a single policy insuring three automobiles for uninsured motorist coverage.[69] A separate premium was charged for each vehicle.[70] In finding that the insured was entitled to stack the separate coverages, the court distinguished the fact that in *Talbot* a lump sum premium was charged while in the instant case separate premiums were charged.[71] The court appeared to create a rebuttable presumption in favor of stacking where separate premiums were charged for the coverage on each vehicle.[72] While the court determined that the insured was entitled to stack the coverages on each of the three vehicles in this particular case, the court expressly reaffirmed the *Talbot* proposition "that by using clear and unambiguous language" an insurer could "legally insure more than one automobile in the same policy and limit its uninsured motorist coverage to the minimum amount specified by the financial responsibility law."[73]

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[62] 323 So. 2d 536 (Miss. 1975).

[63] *Roberts*, 323 So. 2d at 536.

[64] *Id.* at 538.

[65] *Id.* The court explained that this is no different than a situation where you have three vehicles insured by three policies issued by three different insurance companies. *Id.*

[66] *Id.*

[67] 350 So. 2d 1379 (Miss. 1977).

[68] *Bridges*, 350 So. 2d at 1380.

[69] *Id.*

[70] *Id.* at 1381.

[71] *Id.*

[72] *Id.* Notably absent from this opinion is any consideration of the fact that

In *Pearthree v. Hartford Accident & Indemnity Co.*,[74] the court appeared to backtrack with regard to the importance of separate premiums in determining whether stacking would be allowed.[75] In *Pearthree,* the injured insured had two automobiles covered under a single uninsured motorist policy.[76] The court stated that "it is not clear whether Hartford charged separate premiums" on the injured insured's two automobiles. [77] However, the court explained that "the charging of separate premiums is not decisive" on the question of stacking.[78] The court went on to state that "a construction permitting aggregation (i.e., stacking) flows from the ambiguity of the limiting clauses in the policies covering more than one automobile, not from the charging of separate premiums."[79] The court ultimately found that the policy was ambiguous and allowed stacking.[80]

The Mississippi Supreme Court returned to the separate premium presumption in *Government Employees Insurance Co. v. Brown.*[81] In this case, a Class I insured was allowed to stack the uninsured motorist coverage on three separate vehicles listed on a single policy despite the fact that the policy contained a "limits of liability" clause, which on its face, clear-

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the more vehicles insured the more vehicles that may be on the road at any one time and, therefore, the more risk to the insurer.

[73] *Id.*

[74] 373 So. 2d 267 (Miss. 1979).

[75] *Pearthree*, 373 So. 2d at 270.

[76] *Id.* at 268.

[77] *Id.* at 270.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 270-71.

[81] 446 So. 2d 1002, 1006 (Miss. 1984).

ly and unambiguously precluded stacking.[82] The court explained that after "[a] more mature reflection of the legislative intent of the uninsured motorist statute and of a more seasoned analysis" the decision in *Bridges* is "the better reasoned holding and we now adopt its rationale and expressly abandon the *Talbot* rationale."[83] The court went on to state that although "a presumption arises that coverage of multi-vehicles in one policy, where separate premiums were paid for each endorsement of uninsured motorist coverage, is the same as if such coverage was provided in separate policies covering the same vehicles," the court essentially shut the door on any such limitation by later saying that "recovery cannot be limited by an insurer for benefits for which a premium is paid by an insured, notwithstanding clear and unambiguous language of attempted limitation by the insurer."[84] The court also expressed concern for the possibility that "inconsistent" results might have occurred if the previous contrary holdings involving multi-vehicle policies were followed.[85]

Stacking of uninsured motorist coverage on multiple vehicles insured under a single policy was extended to Class II insureds in *Brown v. Maryland Casualty Co.*[86] In this case, a guest passenger who apparently had no uninsured motorist insurance of her own was injured in an accident involving another vehicle which carried $10,000 in liability coverage.[87] The vehicle the guest passenger was riding in was one of two vehicles insured under a single policy providing for $10,000 in uninsured motorist coverage on each vehicle and charging a separate premium for each coverage.[88] The court concluded that the guest passenger was entitled to stack the coverages.[89] The opinion did not address the specific policy language or explain the basis for concluding that the tortfeasor's vehicle was underinsured as to the guest passenger.[90]

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[82] *Brown*, 446 So. 2d at 1006. The court held that while the limits on liability clause was clear on its face, "when read together with the declaration sheet it becomes unclear and ambiguous." *Id.* Thus, the court held that the limitation failed. *Id.* Further, the court held that since the limitation failed the insured should be allowed to aggregate the coverages. *Id.*

[83] *Id.* at 1005-06.

[84] *Id.* at 1006. Notably absent from this opinion is any analysis as to what coverage was actually paid for by the insured. The opinion seems to presuppose that total premium charged warranted $30,000.00 in uninsured motorist coverage as opposed to $10,000.00 in uninsured motorist coverage.

[85] *Id.* at 1005. One would not normally expect this type of concern to be solved by the judiciary.

[86] 521 So. 2d 854, 856-57 (Miss. 1987). As the court explained, "[T]he issue on this appeal is whether or not a Class II occupancy insured is entitled to stack the coverages held by the named insured under his uninsured motorist policy." *Brown*, 521 So. 2d at 855.

One of the most significant cases in the evolution of Mississippi's stacking case law is *Wickline v. United States Fidelity & Guaranty Co.*[91] In this case, a guest passenger was killed when the automobile she was riding in collided with a parked automobile.[92] The driver of the vehicle the guest passenger was riding in was at fault.[93] At the time of the accident, the guest passenger was insured under two insurance policies of her own, which provided uninsured motorist coverage in the amount of $10,000 per person and $20,000 per accident.[94] The vehicle in which she was riding was insured under a policy providing liability coverage of $10,000 per person and $20,000 per accident.[95] Four other cars were covered under this same policy, and separate premiums were charged for the uninsured motorist coverage on each of these cars.[96] The guest passenger's survivors sought recovery of the coverage on each one of the other four vehicles under the driver's policy.[97]

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[87] *Id.*

[88] *Id.*

[89] *Id.* at 857. The court actually awarded the guest passenger $10,000 which represented the stacked uninsured motorist coverage after offsetting the $10,000 liability payment. *Id.*

[90] *Id.* at 856.

[91] 530 So. 2d 708 (Miss. 1988)

[92] *Wickline*, 530 So. 2d at 710.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 712.

The court explained that an injured person is entitled to stack the uninsured motorist coverage on his own vehicles on top of any uninsured motorist coverage on the vehicle in which he was riding in order to qualify the tortfeasor as an underinsured motorist.[98] The court then went on to address the question of "whether a guest passenger can aggregate the owner's coverages on the owner's other vehicles."[99] The court rejected the trial court's conclusion that stacking of the coverages on these other vehicles was not permissible since a guest passenger was a Class II insured and therefore "had no connection with the other three . . . vehicles."[100] The court reasoned that the premiums had been paid by the named insured "for the benefit of all insureds."[101]

In *Thiac v. State Farm Mutual Automobile Insurance Co.*,[102] the Mississippi Supreme Court addressed the question of what coverages a guest passenger is entitled to stack in order to establish the tortfeasor's vehicle as an underinsured motor vehicle.[103] *Thiac* involved a one-vehicle accident, where a guest passenger was injured when the owner driver hit a tree.[104] The guest passenger had no UM coverage of his own.[105] The court refused to allow the guest passenger to stack the coverages, on the owner's other vehicles in order to establish the owner's vehicle as underinsured.[106] The court expressly held that "for the purpose of qualifying the host vehicle as underinsured, a guest passenger is permitted to stack her own UM coverage with the UM coverage on the host vehicle."[107] The court also concluded that this is the rule regardless of whether the owner's other vehicles are insured under the same policy or different policies.[108]

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[97] *Id.*

[98] *Id.* at 713.

[99] *Id.*

[100] *Id.* at 714. The court also rejected the argument that only Class I insureds should receive the benefit of stacking since they are the only ones who paid the multiple premiums entitling them to the multiple coverages. *Id.*

[101] *Id.* The basis for this conclusion is not discussed in the opinion. The court went on to reject the survivors' argument that they were entitled to recover "the per person" limits under the policy because of their status as wrongful death beneficiaries. *Id.* at 715. In this regard the court held that heirs simply stand in the same position as the deceased would have stood had she survived. *Id. See* Cossitt v. Nationwide Mut. Ins. Co., 551 So. 2d 879, 884 (Miss. 1989) (holding that Class II insureds may stack coverages).

[102] 569 So. 2d 1217 (Miss. 1990).

[103] *Thiac*, 569 So. 2d at 1218.

[104] *Id.*

[105] *Id.* at 1221.

In the case of *State Farm Mutual Automobile Insurance Co. v. Davis*,[109] the court addressed the question of whether a guest passenger could stack the uninsured motorist coverage on the owner's other vehicles insured under separate policies.[110] The court distinguished *Wickline* in finding that guest passengers could not stack coverage on the owner's other vehicles because they did not meet the definition of an insured under those policies.[111] The court also recognized the distinction between "stacking for the purpose of establishing the insured vehicle as underinsured, as opposed to stacking for the purpose of recovering damages."[112] The dissent in this case argued that the majority's ruling "invites insurance companies to thwart the principle of . . . stacking by refusing to issue multi-vehicle policies.[113]

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[106] *Id.* at 1220-21.

[107] *Id.* at 1221.

[108] *Id.* The court noted that the guest passenger "had the means to protect herself against tortfeasors who carry insurance which is legally sufficient but inadequate to compensate the damages sustained." *Id.*

[109] 613 So. 2d 1179 (Miss. 1992).

[110] *Davis*, 613 So. 2d at 1179.

[111] *Id.* at 1182. *See* Box v. State Farm Mut. Auto. Ins. Co., 692 So. 2d 54, 58 (Miss. 1997) (holding that Class II guest passenger cannot stack uninsured motorist coverages under separate policies covering separate vehicles).

[112] *Davis*, 613 So. 2d at 1183. *See* Mississippi Farm Bureau Cas. Ins. Co. v. Curtis, 678 So. 2d 983, 989 (Miss. 1996) (holding that Class II insured only insured under policy insuring vehicle he was driving at time of accident); Miller v. Allstate Ins. Co., 631 So. 2d 789, 791 (Miss. 1994) (holding that guest passenger could not stack coverage where guest passenger did not meet statutory and policy definitions of "insured").

[113] *Davis*, 613 So. 2d at 1185 (McRae, J., dissenting). The dissent implies that this would be wrong even though there is no language in the uninsured motorist statutes or in Mississippi contract law which would preclude an insurer from avoiding stacking through clear and unambiguous language.

In the case of *Harrison v. Allstate Insurance Co.*,[114] the insurer attempted to avoid stacking of uninsured motorist coverage on multiple vehicles insured under a single policy.[115] The insurer charged one premium for a one-car policy and a different premium for policies insuring two or more vehicles.[116] The court restated its presumption that where separate premiums are charged a presumption arises in favor of stacking.[117] The court went on to note that the insurer's policy language "on its face, clearly precludes stacking."[118] However, the court allowed stacking after finding that the insured "was actually charged separate premiums for his two vehicles under the guise of one lump sum on his declaration sheet."[119]

Finally, in *United States Fidelity and Guaranty Co. v. Ferguson*,[120] the Mississippi Supreme Court declared "that the public policy of this state mandates stacking of UM coverages for every vehicle covered under a policy regardless of the number or amount of the premium(s) paid for UM coverage."[121] The court noted that "[i]nsurance companies have responded [to the court's decisions] by rewriting their policy language . . . in order to circumvent our decisions."[122] In the opinion's "Conclusion," the court reiterated the holding and its basis:

> Based upon the sound economic benefits of allowing stacking and the lack of bargaining power of the insured, we announce a new public policy against anti-stacking provisions in insurance contracts in this state as applied to UM coverage. We will no longer permit insurance companies to . . . defeat public policy by denying insureds their full aggregate UM cover-

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[114] 662 So. 2d 1092 (Miss. 1995).

[115] *Harrison*, 662 So. 2d at 1093.

[116] *Id.*

[117] *Id.* at 1094.

[118] *Id.*

[119] *Id.* The court did not address or analyze whether the reduced premiums were commensurate to the risks insured against.

[120] 698 So. 2d 77 (Miss. 1997).

[121] *Ferguson*, 698 So. 2d at 79.

[122] *Id.*

> age for which they pay a premium.[123]

As Justice Lee recognized in his concurring opinion, the majority "[stepped] across the fine line dividing interpretation of the law with promulgation of the law."[124]

4. *Stacking and Fleet Policies*

The term "fleet policy" generally refers to a single policy that covers multiple vehicles owned by the same insured.[125] The term is routinely used to describe automobile insurance policies covering the vehicles owned and used by a corporation, business or partnership.[126] In addressing the question of stacking coverages under fleet policies, the Mississippi Supreme Court has refused to recognize any distinction between fleet policies and any other automobile policy.[127] Specifically the court stated that "there are no statutory distinctions between the various types of auto policies in our [uninsured motorist] statute."[128] Based on this language, it would appear that the court will utilize the same stacking principles in interpreting a fleet policy (regardless of the number of vehicles insured on the premium charged) as it would any other policy.[129]

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[123] *Id.* at 82. Again the court seemed to presuppose that the premiums charged supported the stacked coverage.

[124] *Id.* (Lee, J., concurring).

[125] BLACK'S LAW DICTIONARY, 639 (6th ed. 1990).

[126] While refusing to label it as such, the first fleet policy stacking case was *Cossitt v. Nationwide Mut. Ins. Co.*, 551 So. 2d 879 (Miss. 1989). This case involved a single policy covering three church buses. *See Cossitt*, 551 So. 2d at 880. The court allowed the guest passenger to stack the coverages on each of the three buses. *Id.* at 884. The court refused to label the policy a "fleet policy" reasoning that many people have from "three to seven" automobiles on one policy. *Id.* at 884.

[127] *See* Harris v. Magee, 573 So. 2d 646, 655 (Miss. 1990) (holding that Mississippi statutory scheme does not distinguish between commercial fleet policies and other policies). What generally distinguishes a fleet policy from a regular policy is the fact that a corporation or partnership is the named insured and owns the vehicles insured under the policy. A business or partnership should arguably have the right to limit the amount of uninsured motorist coverage purchased so long as the minimum limits are provided.

[128] *Harris*, 573 So. 2d at 652. While the court's statement is correct, it is also true that there is nothing in the statute that could reasonably be construed to prevent an insurer and a corporation from contractually making such distinctions and limiting the expense of carrying larger uninsured motorist limits than the company wishes to pay for. *See* Wilson v. Security Ins. Co., 569 A.2d 40, 42 (Conn. 1990) (holding that stacking was beyond reasonable expectation of parties,

5. Where Do We Go from Here?

Insureds would arguably be better served if Mississippi's uninsured motorist law allowed the insured simply to select the amount of uninsured motorist coverage that he or she would like to have available to protect themselves and their families in the event of an accident with an uninsured/underinsured motorist. A straightforward and understandable policy that clearly sets out the maximum amount of uninsured motorist coverage available "per person" and "per accident" should be enforced as written. The named insured would undeniably get the benefit of what was bargained for because he would know both how much coverage he has and what he is paying for the coverage. Any judicial review of the contract would then focus on whether the total premium is reasonably related to the risks insured against and not on how the premiums are charged.[130]

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and was inappropriate in context of fleet policy, where town paid total of $137 for uninsured motorist coverage on thirty-one vehicles and where stacking would result in $1,240,000 in UM coverage on each of the thirty-one vehicles); United Servs. Auto. Ass'n v. Wilkinson, 569 A.2d 749, 751 (N.H. 1989) (stating that unambiguous limitation of liability endorsement to fleet policy precluded stacking); Thompson v. Royal Ins., 521 A.2d 936, 940 (Pa. 1986) (holding that Class I insured may not stack coverages under a commercial fleet policy); Baker v. Hanover Ins. Co., 568 A.2d 1023, 1025 (R.I. 1990) (upholding clear policy language precluding stacking of vehicles in fleet policy). *See also* Florida Farm Bureau Cas. Co. v. Hurtado, 587 So. 2d 1314, 1318-19 (Fla. 1991) (finding that employee was Class II insured and therefore not entitled to stack uninsured motorist coverage on eleven vehicles insured under employer's policy); Lambert v. Liberty Mut. Ins. Co., 331 So. 2d 260, 261-65 (Ala. 1976) (rejecting argument that there is no difference between fleet policy and family policy insofar as stacking is concerned since status of employee as insured is only by virtue of occupancy of vehicle).

[129] In *Harris*, the injured employee was allowed to stack the coverages on twenty-two other vehicles listed on the employer's policy after being hit by an uninsured motorist. *Harris*, 573 So. 2d at 654-55.

[130] This is particularly so since "the legal origin of stacking is contract and not statute." *In Re* Koestler, 608 So. 2d 1258, 1261 (Miss. 1992), *overruled by* Nationwide Mut. Ins. Co. v. Garriga, 636 So. 2d 658 (Miss. 1994). In addition, "there is

In sum, it appears that the court has attempted to protect the insured and to lessen the confusion surrounding stacking by increasing the situations where stacking is permitted when a more restrictive approach would protect the insured's rights equally well while yielding results more consistent with the expectations of the parties and the statutory language.

V. WHAT CONSTITUTES "USING" A VEHICLE?

As previously discussed, Class I insureds are covered any time they are injured by an uninsured motorist, and it makes no difference whether they are in an insured vehicle or any vehicle whatsoever at the time they are injured.[131] Class II insureds, on the other hand, are only insured under certain circumstances. According to section 83-11-103 (b) of the Mississippi Code, a permissive user is covered when he "*uses*, with the consent . . . of the named insured, the motor vehicle to which the policy applies" and guest passengers are "insured" when "*in* such motor vehicle to which the policy applies."[132] While this language would appear to be straightforward, the cases applying this language have yielded somewhat surprising results.[133] Under Mississippi law as it now stands, a Class II insured does not have to be inside the insured vehicle when injured by the uninsured motorist in order to be covered.[134] The term "uses" has been expanded by the court beyond the time when the Class II insured is actually "in" or "using" the insured vehicle.[135]

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no public policy against limiting insurance coverages." *In re Koestler*, 608 So. 2d at 1263.

[131] *See supra* notes 33-34 and accompanying text.

[132] MISS. CODE ANN. § 83-11-103 (1999) (emphasis added).

[133] Rather than follow the seemingly plain meaning and intent of this language, in order to expand the coverage available to Class II insureds the court has been very liberal in deciding when a person is considered to be "in" or "using" the insured vehicle.

[134] *See* Cossitt v. Nationwide Mut. Ins. Co., 551 So. 2d 879, 884 (Miss. 1989) (holding that Class II insured was covered when struck by insured motorist while standing outside of bus); Stevens v. United States Fidelity & Guar. Co., 345 So. 2d 1041, 1044 (Miss. 1977) (holding that Class II insured was covered for injuries suffered when struck while working outside of truck).

[135] *See Cossitt*, 551 So. 2d at 884 (holding that Class II insured was "occupy-

In *Stevens v. United States Fidelity and Guaranty Co.*, the court broadly interpreted the term "using" so as to cover a Class II insured wrecker driver who was hit while six to eight feet from his truck and working to remove another truck that had been damaged in an accident.[136] The court framed the issue in this case as whether the "injury arises from the use of a [insured] vehicle."[137] The court explained that the answer to this question depends on the specific circumstances and must be determined on a case-by-case basis.[138] The court also reasoned that it was "obvious" that the wrecker would be used to remove "disabled vehicles from the highway" and that this was a "necessary part of the operation of the wrecker."[139]

In *Cossitt v. Nationwide Mutual Insurance Co.*, the court interpreted the terms "occupying" and "using" to be essentially synonymous.[140] In this case, the court found that Class II insured passengers were "occupying" the church bus when they were hit by an uninsured motorist four feet from the bus while looking for somewhere to go to the bathroom.[141] The court further expanded the meaning of the term "using" in *Harris v. Magee*.[142] In *Harris*, a company employee driving a company truck stopped approximately seventy-five feet behind a self-propelled crane which had broken down.[143] The company employee was hit by an uninsured motorist while crawling out from

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ing" vehicle when struck by uninsured motorist while working outside of vehicle); *Stevens*, 345 So. 2d at 1044 (holding that Class II insured was "using" vehicle when struck while working outside of vehicle).

[136] *Stevens*, 345 So. 2d at 1043-44.

[137] *Id.* at 1043. The key to this opinion is how the court chose to frame the issue. Based on the statutory language the court certainly could have (and arguably should have) framed the issue as whether the wrecker driver was actually using the insured vehicle as a means of transportation at the time of the accident.

[138] *Id.*

[139] *Id.* at 1043-44.

[140] *Cossitt*, 551 So. 2d at 884.

[141] *Id.* at 881.

[142] 573 So. 2d 646, 651 (Miss. 1990).

[143] *Harris*, 573 So. 2d at 648. The crane was not covered by uninsured motorist coverage. *Id.*

under the crane.[144] The court rationalized that since the employee could not accomplish his job (i.e., helping repair the disabled crane) without exiting the truck and since "[s]topping to repair the crane was a necessary aspect of the truck's operation," then the employee was "using" the insured vehicle at the time of the accident.[145] The court went even further in stating that "[i]t cannot be said that temporarily exiting the vehicle constituted an abandonment of its use."[146]

In the case of *Johnson v. United States Fidelity & Guaranty Co.*, the court again broadened the scope of the term "using" when it found that a student walking from his home to board a parked school bus approximately 141 feet away was "using" the bus and, therefore, was entitled to uninsured motorist coverage.[147] The court concluded that there is no difference between "injuries suffered while preparing to board a bus for the first time. . .[and] preparing to re-board a bus."[148] However, the court added that "[c]learly, not all preparations to board a covered vehicle, no matter how remote, should be held to constitute 'use' of the vehicle in question. Nevertheless, the courts are fully capable of establishing reasonable parameters in this regard . . . ."[149]

As a practical matter the court has not established any "reasonable parameters" to guide trial courts and lawyers in determining when a Class II insured is "using" the insured vehicle. Rather than drawing a bright line by focusing on whether the Class II insured was actually "in" or "using" (i.e., riding in or driving) the insured vehicle at the time of the accident, the court has continued to muddy the water and has created many more questions than it has answered. For example, is the Class II insured covered while walking to or from a sporting event, concert or casino? How far from the insured vehicle can the Class II insured be and still be considered to be "using" the vehicle? Or, are courts now required to speculate and determine the subjective intent of the potential Class II insured: was he really "preparing" to get in the vehicle, or was he just going to get a book or a pack of cigarettes?

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[144] *Id.*

[145] *Id.* at 651. The relationship between the truck and the accident would seem to have been incidental. Under the court's reasoning, a necessary aspect of a traveling salesperson's vehicle would be stopping, so that he can make a sales call. A more logical conclusion would be to include the employee in the equation (i.e., stopping to repair the crane was a necessary part of the employee's job having little to do with the operation of the truck).

[146] *Id.* This appears to be far broader than the plain language of the statute.

[147] Johnson v. United States Fidelity & Guar. Co., 726 So. 2d 167, 169 (Miss. 1998).

[148] *Johnson*, 726 So. 2d at 169.

[149] *Id.* It is difficult to imagine how and where these lines will be drawn.

As the law stands now, Class II insureds are covered (1) when they have only "temporarily" exited the insured vehicle, (2) while walking to and from the insured vehicle, and (3) while outside the insured vehicle doing something that can be considered to be "a necessary aspect" of the vehicle's "operation." Until the court provides further guidance, exactly where these lines start and end will remain unclear. An approach that would remedy some of the confusion would be to turn the focus back to the principal use and purpose of a motor vehicle which is used as a means of transportation.[150] If the Class II insured was actually "using" the insured vehicle as a means of transportation, then he would be covered. This approach would be consistent with the statutory language, and the result would not seem as harsh when it is remembered that Class II insureds have the opportunity to protect themselves as pedestrians by simply purchasing their own uninsured motorist coverage.

VI. PHYSICAL CONTACT REQUIREMENT

Another part of the uninsured motorist statute which has generated litigation is the statute's physical contact requirement. Section 83-11-103(c)(v) of the Mississippi Code defines an "uninsured motorist vehicle" so as to include

> [a] motor vehicle of which the owner or operator is unknown;

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[150] Looking at the specific language of the statute, it is doubtful that the legislature intended for guest passengers and permissive users to be covered when they are outside of the insured vehicle and, thus, pedestrians.

> provided that in order for the insured to recover under the endorsement where the owner or operator of any motor vehicle which causes bodily injury to the insured is unknown, actual physical contact must have occurred between the motor vehicle owned or operated by such unknown person and the person or property of the insured.[151]

The Mississippi Supreme Court has refused to find coverage where there was no contact between the unknown automobile and the insured or the insured's automobile.[152] One of the purposes of this provision of the uninsured motorist statute would seem to be to limit the insurer's exposure to potentially fraudulent claims.[153] However, an insured cannot overcome the contact requirement by producing evidence that there was no fraud.[154]

The court did ease the requirement somewhat in *Southern Farm Bureau Casualty Insurance Co. v. Brewer*.[155] The *Brewer* court concluded that the physical contact requirement was met when a vehicle operated by an unknown individual hit a brake drum throwing it through the insured's windshield and striking the insured in the face.[156] Under the logic of this opinion, the physical contact requirement will be met anytime the unknown vehicle makes contact with an object and propels that object into the insured's vehicle.[157] However, it is unclear exactly how far the court would extend this holding. Given the purposes and clear language of the provision, it seems reasonable that the rule should not be extended further, as when an object struck by an uninsured motorist comes to rest before coming into contact with the insured. If the court were to extend the connection after the object came to a rest, then there would be no bright line, and sympathetic circumstances would inevitably result in an expansion of coverage.[158] Moreover, the potential for fraud would come back into play.

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[151] MISS. CODE ANN. § 83-11-103(c)(v) (1999). Physical contact is not required when the uninsured vehicle or its driver is identified. Brown v. Hartford Ins. Co., 606 So. 2d 122, 126 (Miss. 1992). Furthermore, if there is a question of fact as to whether the correct vehicle or driver has been identified, then this is a question of fact for the jury. *Brown*, 606 So. 2d at 126.

[152] *See* Anderson v. State Farm Mut. Ins. Co., 555 So. 2d 733, 735 (Miss. 1990); Aetna Cas. & Sur. Co. v. Head, 240 So. 2d 280, 282 (Miss. 1970) (holding that there was no coverage where passenger in unknown automobile threw bottle which hit insured's automobile).

[153] *See Anderson*, 555 So. 2d at 734.

[154] *See id.*

[155] 507 So. 2d 369 (Miss. 1987).

[156] *Brewer*, 507 So. 2d at 372. This opinion did not address whether the unknown motorist had any fault.

[157] *See id.*

VII. RESIDENT RELATIVES

Resident relatives of named insureds are Class I insureds for UM purposes.[159] The Mississippi Supreme Court has had the opportunity on more than one occasion to construe "resident" in the UM context and has taken advantage of the opportunities to give a broad meaning to the term.[160]

In *Aetna Casualty & Surety Co. v. Williams*, a university student lived with his mother who had obtained legal custody of the student in her divorce from the student's father.[161] The student's father did have visitation rights, and there was some evidence that the student had spent some limited time at the father's home.[162] In ruling that the student was an insured under the father's UM policy, the court held as a matter of law that a child is a resident of both parents' households until he reaches the age of majority or becomes fully emancipated.[163]

Chief Justice Hawkins' unusually critical dissent in *Williams* criticized the majority for its shortsightedness and disregard for precedent.[164] In what appears to be a well reasoned argument, Justice Hawkins showed that the majority did not consider the consequences of its opinion.[165] He reasoned that by ruling that one can be a resident without any factual basis, uninsured motorist coverage was obviously expanded. However, liability coverage would be excluded if the "resident" was injured while a passenger in the named insured's automobile, and liability coverage would be excluded if the named insured was driving the "resident's" vehicle.[166] Justice Hawkins ventured that these latter two situations were probably more likely to occur in the future, and that the majority's logic would consequently benefit no one except lawyers profiting from the litigation of these issues.[167]

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[158] *See Anderson*, 555 So. 2d at 734 (holding that where accident is caused by unknown motorist and no physical contact resulted between insured's automobile and other driver, there is no coverage).

[159] *See supra* note 18 and accompanying text.

[160] *See* J&W Foods Corp. v. State Farm Mut. Auto. Ins. Co., 723 So. 2d 550, 553 (Miss. 1998) (holding that relative of shareholder of insured corporation may be "relative" for UM purposes).

[161] 623 So. 2d 1005, 1006 (Miss. 1993).

[162] *Williams*, 623 So. 2d at 1008. The student maintained a room in his father's house and kept clothes and other personal belongings there. *Id.* The father provided for the son's material needs, such as buying him a car and giving him money. *Id.*

[163] *Id.* at 1011.

In *Johnson v. Preferred Risk Automobile Insurance Co.*,[168] the plaintiffs were a young married couple who had elected not to purchase any insurance on their own vehicle.[169] After leaving their former home in Tennessee and before a planned move to Arkansas, the couple stayed with their respective parents in Mississippi for approximately two weeks.[170] After having an accident in their vehicle, they sought UM benefits under their parents' policies.[171] The court, in holding that the plaintiffs were residents of their parents' homes, expressly overruled prior law on point.[172] Once again, Chief Justice Hawkins pointed out that the court's interpretation of "resident" differed from its ordinary meaning.[173]

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[164] *Id.* at 1018 (Hawkins, C.J., dissenting).

[165] *Id.* at 1021 (Hawkins, C.J., dissenting). Justice Hawkins reasoned that by extending coverage to noncustodial parents, who are strangers to the child, insurance companies will be forced to raise premiums to finance the coverage. *Id.* (Hawkins, C.J., dissenting).

[166] *Id.* at 1020 (Hawkins, C.J., dissenting).

[167] *Id.* at 1021 (Hawkins, C.J., dissenting).

[168] 659 So. 2d 866 (Miss. 1995).

[169] *Johnson*, 659 So. 2d at 868.

[170] *Id.* The couple claimed that they were each residents in the homes of their respective parents. *Id.*

[171] *Id.*

[172] *Id.* at 870. The cases overruled were the very ones cited by Chief Justice Hawkins in his *Williams* dissent. *See Williams*, 623 So. 2d at 1015 (Hawkins, C.J., dissenting) (citing Goens v. Arinder, 161 So. 2d 509 (Miss. 1964)).

[173] *Johnson*, 659 So. 2d at 876 (Hawkins, C.J., concurring). Chief Justice

In short, it appears that the practitioner should assume that "resident" under current Mississippi UM law requires a minimum of contact with the residence at issue and that the court will continue to broadly construe the term.

VIII. OFFSETS AND CREDITS

Almost all insurance policies contain clauses which attempt to offset or limit the insurer's obligation to the insured for damages that have already been paid by another insurer. The court has generally allowed such provisions finding that there is no public policy against the insurer preventing a windfall to the insured.

In the uninsured motorist insurance context, most policies attempt to set off the amount of uninsured motorist coverage available by the amount which the injured insured received from the tortfeasor's liability carrier. Insurers also have attempted to offset the uninsured motorist coverage by payments made under other coverages under the same policy or from an outside source such as workers compensation.

A. *Offset for Liability Payments*

The Mississippi Supreme Court allows an insurer to offset the uninsured motorist limits by the amounts paid by the tortfeasor's liability carrier or amounts otherwise available to the insured.[174] In *State Farm Mutual Automobile Insurance Co. v. Kuehling*, the court gave an example where a tortfeasor

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Hawkins reiterated his view that by giving uninsured motorist coverage to those who chose not to have it, those who do pay for insurance will be forced to compensate the insurance companies for these losses through higher premiums. *Id.* (Hawkins, C.J., concurring).

[174] *See* Fidelity & Guar. Underwriters, Inc. v. Earnest, 699 So. 2d 585, 592 (Miss. 1997) (stating that legislative history indicated that Congress intended to allow offsets); State Farm Mut. Auto. Ins. Co. v. Kuehling, 475 So. 2d 1159, 1163 (Miss. 1985) (holding insured entitled to offset uninsured motorist coverage by settlement from tortfeasor's insurance company). The *Kuehling* court relied on section 83-11-111 of the Mississippi Code, which expressly "allows insurers to contract with regard to excess coverage so long as the Mississippi rules regarding exclusion and stacking are not violated." *See Kuehling*, 475 So. 2d at 1162.

has $10,000 in liability insurance while the injured insured has $20,000 in uninsured motorist coverage.[175] In this situation, the insured is entitled to an offset for $10,000 in liability insurance.[176] The court went on to explain that if the tortfeasor's liability limits match the injured insured's uninsured motorist limits, then no uninsured motorist coverage is available.[177] The court expressly stated that "[t]he insurance company is bound to pay only that amount which constitutes the difference between policy limits available under an insured's own policy and that amount received from one underinsured."[178]

In Mississippi, there is no requirement that the insured exhaust the tortfeasor's liability limits in order to recover under her own uninsured motorist policy.[179] So long as the tortfeasor's vehicle qualifies as an underinsured motor vehicle, the insured can settle for less than the full liability limits and then pursue an uninsured motorist claim against her own insurer. Under these circumstances, the insurer is only entitled to an offset of the amount of liability limits actually paid. The insured also has no obligation to exhaust the primary uninsured motorist limits in situations where the insured is a Class II insured, by virtue of being a guest passenger in an automobile carrying uninsured motorist coverage, and a Class I insured under her own policy.[180]

B. Who Gets the Offset First?

While some states "pro rata" the offset, it appears that Mississippi follows the rule that the primary insurer is entitled to the offset first.[181] Since insurance normally follows the vehicle, the coverage on the vehicle should be primary.[182]

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[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.* at 1163.

[179] *See* Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 461-62 (Miss. 1971) (stating that uninsured motorist coverage is available to injured insured and cannot be dismissed by provision in policy).

[180] *See* Mississippi Farm Bureau Mut. Ins. Co. v. Garrett, 487 So. 2d 1320, 1324 (Miss. 1986).

[181] *See* Dixie Ins. Co. v. State Farm Mut. Auto Ins. Co., 614 So. 2d 918, 923

C. Workers Compensation Payments

No offset is allowed for amounts an insured receives from workers compensation.[183] Even though unambiguous provisions in the UM policy may provide for such an offset, the Mississippi Supreme Court has held that such offsets cannot reduce the UM benefits below the statutory minimum of coverage.[184] By further holding that the statutory minimum is that amount selected by the insured up to the amount of the insured's liability insurance limits, the court has for all practical purposes negated all workers compensation offset provisions.

D. Set Off for Medical Payments Coverage

The Mississippi Supreme Court has refused to allow the insurer to offset the uninsured motorist coverage available by payments made under the medical payments provisions contained in the insured's policy where the insured's damages exceeded the uninsured motorist limits.[185] While the insurer may not offset the coverage available where the result would be less than full compensation to the insured, the court has not addressed the question of whether the insurer can set off a judgment by medical payments coverage paid in order to prevent double recovery. For example, an insured with $20,000 in uninsured motorist coverage and $5,000 in medical payments coverage who is found to have $20,000 in damages, should only recover $20,000, not $5,000 in medical payments, and $20,000

(Miss. 1992) (holding primary insurer's policy not subject to pro-ration of offset provision).

[182] *See Dixie Ins. Co.*, 614 So. 2d at 922.

[183] *See* Nationwide Mut. Ins. Co. v. Garriga, 636 So. 2d 658, 660 (Miss. 1994).

[184] *See Harthcock*, 248 So. 2d 459-60 (requiring State Farm to pay all sums due to insured regardless of exclusionary clause in contract that made UM coverage conditional upon insured surrendering their right to settle with another tortfeasor).

[185] *See id.* at 459 (holding attempt to reduce coverage below statutory minimum by UM coverage void).

in uninsured motorist benefits. Accordingly, in a suit against the insurer, the jury should either be advised of the payments under the medical payments coverage, or the trial court should be allowed to offset any verdict equal to or below the policy limits by the amount medical payments coverage paid.[186]

IX. PROCEDURAL ISSUES

A. *Is the Amount of Coverage Admissible?*

A question which is not covered by the uninsured motorist statute and which has not been addressed by the Mississippi Supreme Court is whether the jury should be instructed at trial as to the amount of uninsured motorist coverage available. In practice, there does not appear to be any consensus among trial court judges or among lawyers on either side of the aisle. Trial courts that allow the amount of coverage to be admissible generally also allow a jury instruction advising the jury of the amount of coverage and that their verdict may not exceed this amount. However, advising the jury of the amount of coverage and instructing the jury in this regard does not serve any purpose and would seem to distract the jury from focusing on their real purpose, which is to determine the amount of damages once the question of liability has been decided.[187] As a practical matter, unless there is a dispute as to the amount of coverage available, the jury has absolutely no need for this information, and the trial judge can simply reform the jury's verdict to the amount of uninsured motorist limits in the event the verdict exceeds this limit.[188]

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[186] For example, if the insured has $10,000 in UM coverage, and has already received $1,500 under his medical payments coverage, and the jury returned a verdict in the amount of $8,000, then an offset should be permissible unless the jury was advised of the payments.

[187] The admission of the uninsured motorist limits is particularly problematical when the alleged tortfeasor and the plaintiff's uninsured motorist carrier are joined in the same suit.

[188] The term "relevant evidence" is defined in Rule 401 of the Mississippi Rules of Evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MISS. R. EVID. 401.

B. Apportionment in Uninsured Motorist Cases

Another unresolved procedural issue involves the question of apportionment. The Mississippi Supreme Court has not specifically addressed the question of how the statute commonly referred to as "the apportionment statute" is to be applied in the context of an uninsured motorist case.[189] Under this statute, a jury must be allowed to apportion fault among all potentially negligent parties (whether present at trial or not).[190] Once the jury apportions the fault the plaintiff may only recover from each defendant that particular defendant's apportioned or pro rata share of the damages awarded (plus presumably whatever amount is necessary in order for the plaintiff to recover at least fifty percent of his damages).[191]

Under section 83-11-101(1) of the uninsured motorist statutes, an insurer is only obligated "to pay the insured all sums which he shall be legally entitled to recover as damages for bodily injury or death from the owner or operator of an uninsured motor vehicle. . . ."[192] Reading these two statutes together, it would appear that an uninsured motorist insurance provider is only responsible for the uninsured/underinsured tortfeasor's apportioned share of the damages (plus any additional amount necessary for the insured to recover at least fifty percent of his or her damages).[193] This application yields a different result from the pre-apportionment uninsured motorist cases where the court held that when an insured's injuries are caused by joint tortfeasors (one who has liability insurance and one who does not) the uninsured motorist insurer may not reduce the amount of coverage by the amount of liability insurance paid on behalf of the insured tortfeasor, unless the injured party has been fully compensated.[194]

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[189] *See* MISS. CODE ANN. § 85-5-7 (1999).

[190] Section 85-5-7(7) specifically provides that "[i]n actions involving joint tortfeasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault." § 85-5-7. *See* Estate of Hunter v. General Motors Corp., 729 So. 2d 1264, 1273 (Miss. 1999) (stating that "the policy considerations underlying the comparative fault doctrine would best be served by the jury's consideration of the negligence of all participants to a particular incident which gives rise to a lawsuit").

[191] Section 85-5-7(2) provides that "the liability for damages caused by two (2) or more persons shall be several only to the extent necessary for the person suffering injury, death or loss to recover fifty percent (50%) of his recoverable damages." MISS. CODE ANN. § 85-5-7(2).

[192] § 83-11-101(1).

[193] An example of the practical effect of this would be where the jury 1) assigns ninety percent of the fault for an accident to a tortfeasor with $10,000 in liability insurance, and 2) assigns ten percent of the fault to a tortfeasor with no liability insurance, and 3) awards damages in the amount of $20,000. If the in-

C. Is the Insured Legally Entitled To Recover from the Tortfeasor?

Section 83-11-101(1) of the Mississippi Code provides that uninsured motorist coverage shall "pay the insured all sums which he shall be *legally entitled to recover* . . . from the owner or operator of an uninsured motor vehicle . . . ."[195] According to this language, if the injured insured could not recover directly from the uninsured or underinsured tortfeasor, then the insured could not recover under his own uninsured motorist coverage. This is because the insurer actually "succeeds to the defenses available to the so-called uninsured motorist."[196] Therefore, the uninsured motorist insurer is entitled to assert any defense or bar that the alleged tortfeasor could have asserted.

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jured plaintiff has $10,000 in uninsured motorist coverage available, then the plaintiff would receive $10,000 from the insured tortfeasor (there is no uninsured motorist coverage available for the damages caused by this tortfeasor since this tortfeasor does not qualify as uninsured or under insured motorist), and the plaintiff would receive only $2,000 from his own insurer for the damages attributable to the uninsured tortfeasor.

[194] *See* Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456 (Miss. 1971).

[195] MISS. CODE ANN. § 83-11-101(1) (1999) (emphasis added).

[196] Aitken v. State Farm Mut. Auto Ins. Co., 404 So. 2d 1040, 1045 (Miss. 1985), *overruled on other grounds by* Burns v. Burns, 518 So. 2d 1205 (Miss. 1988). *See* Perkins v. Insurance Co., 799 F.2d 955, 961 (5th Cir. 1986) (holding that where injured insured precluded from recovering from the tortfeasor because of workers compensation exclusive remedy, then he cannot recover from his uninsured motorist insurer); Coleman v. American Mfrs. Mut. Ins. Co., 930 F. Supp. 255, 257 (N.D. Miss. 1996) (holding that insurer was entitled to assert defense of sovereign immunity where insured injured in collision with city fire truck).

D. Which Law Applies to the Uninsured Motorist Insurance Contract?

In determining questions concerning which state's law should govern policy interpretation, the Mississippi Supreme Court will apply the law of the state with the most significant contacts with the uninsured motorist insurance contract.[197] In making this determination, the court will consider: (1) Where the contract was made, (2) where the contract was negotiated, (3) where the contract was entered, (4) the location of the insured risk, and (5) the "domicile, residence, nationality, place of incorporation and place of business of the parties."[198] When an action is brought on the uninsured motorist contract the court will apply the law of the state which serves as the principle location of the insured risk.[199]

E. Who Has the Burden of Proof?

Generally, the insured has the burden of proof on all issues in an uninsured motorist case. In order to recover benefits under the policy, the insured must prove: (1) that the alleged tortfeasor is uninsured or underinsured, (2) that he was driving with owner's consent (if not a Class I insured), (3) negligence on the part of the alleged tortfeasor, and, (4) the extent of his injuries and damages.[200] Even though the insurer and insured each have a general duty of good faith and fair dealing under the insurance contract, the trial itself is an adversarial proceeding the same as any other trial.

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[197] *See* O'Rourke v. Colonial Ins. Co., 634 So. 2d 84, 85 (Miss. 1993) (applying "center of gravity" test to determine which state's law to apply); Boardman v. United Services Auto. Assoc., 470 So. 2d 1024, 1031 (Miss. 1985).

[198] *Id.* at 1033 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 (1969)).

[199] *See id.* at 1032, 1034 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1969)). In *Boardman*, the plaintiff was involved in an accident in Mississippi with an uninsured Mississippi driver. *Id.* at 1029. However, on the question of coverage under the uninsured motorist contract, the court held that Nebraska law applied where (1) contract was formed in Nebraska, (2) contract was negotiated in Nebraska, (3) contract was substantially performed in Nebraska, (4) principal location of the insured risk was Nebraska, and (5) insured resided in Nebraska. *Id.* at 1034.

[200] *See* Stonewall Ins. Co. v. McQueen, 337 So. 2d 711, 712 (Miss. 1976); State Farm Fire & Cas. Co. v. Wightwick, 320 So. 2d 373, 375 (Miss. 1975).

F. Prerequisites to Filing Suit

Under Mississippi law, there are essentially no prerequisites which must be met before the injured insured may file suit once it is determined that the tortfeasor's vehicle qualifies as an "underinsured motor vehicle." Once it is determined that the tortfeasor's vehicle is "underinsured," the injured insured has the right to sue his uninsured motorist carrier directly.[201] As the Mississippi Supreme Court has explained, "[i]t seems obvious that [the insured] may bring a direct action against . . . her own insurer" for uninsured motorist coverage.[202] This is apparently based on the fact that an uninsured motorist claim is really a first party claim, even though it is an adversarial proceeding much like a third party liability claim.

There is also no requirement that the insured first establish the liability of the uninsured motorist before filing suit.[203] In addition, there is also no requirement that the injured insured exhaust the tortfeasor's liability limits or any primary uninsured motorist coverage before filing suit.[204]

G. Which Case Is Tried First?

An interesting question that is not covered by the uninsured motorist statutes and has not been addressed by the Mississippi Supreme Court is the question of which case is tried first. This situation arises when the injured insured sues both his uninsured motorist carrier and the underinsured tortfeasor in the same lawsuit. The underinsured tortfeasor will normally move to have his claim tried separately from the claim against the uninsured motorist carrier because of the potential for prejudice and juror confusion. If separate trials are granted, the injured insured's lawyer will frequently attempt to proceed to trial against the uninsured motorist insurer first. The apparent reason for this preference is the belief that a jury will award more money against the insured's own insurer than the jury would award against the individual tortfeasor. However, there is no reasonable basis for trying the case against the insurer first, particularly where the damages are not likely to exceed the underinsured tortfeasor's liability coverage. Allowing the injured insured to proceed against the uninsured motorist carrier first also forces the insurer to incur the expense of subrogating against the tortfeasor which frequently leads to inconsistent results.

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[201] *See* Hodges v. Canal Ins. Co., 223 So. 2d 630, 634 (Miss. 1969).

[202] *Hodges*, 223 So. 2d at 634.

[203] *See* Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428, 433 (Miss. 1993) (explaining that insured's prior suit against uninsured did not establish liability for insurance company); Farned v. Aetna Cas. & Surety Co., 263 So. 2d 790, 791 (Miss. 1972) (stating that insured "could bring a direct action against the insurer without first establishing the liability of the uninsured motorist whether known or unknown"); Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456 (Miss. 1971) (allowing insured to sue directly, before establishing liability by suing uninsured motorist).

[204] *See* Mississippi Farm Bureau Mut. Ins. Co. v. Garrett, 487 So. 2d 1320, 1323 (Miss. 1986).

H. Is the Insurer Bound by the Insured's Judgment Against the Tortfeasor?

The Mississippi Supreme Court has held that unless the uninsured motorist insurer is a party at the trial of the injured insured's claims against the alleged tortfeasor, any resulting judgment against the tortfeasor is not res judicata as to the insurer.[205] In a subsequent suit by the injured insured against his insurer, the insured still has the burden of proving all the elements of her claim.[206] It is also interesting to note that the court has held that the insurer has no standing to intervene in the suit filed by the injured insured against the tortfeasor when the insurer is not named in the suit.[207]

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[205] *See Wightwick*, 320 So. 2d at 375.

[206] *See id.*

[207] *See id.*

I. Statute of Limitations in Uninsured Motorist Cases

The statute of limitations applicable to an uninsured motorist claim is the same as the limitation applicable to the injured insured's claim against the tortfeasor.[208] If the claim involves an adult insured, then the claim must be filed within three years of the date of the accident.[209] If the claim involves a minor, the three-year statute of limitations will be tolled until the child reaches the age of twenty one.[210]

J. Who Should the Insurer Pay?

The question of who the insurer should pay normally arises when the insured dies as a result of the accident. Where there is a facility of payment clause in the policy, the insurer can pay any of the wrongful death heirs it chooses.[211] There is no requirement that the insurer open an estate or petition to determine heirs before making any payments. However, the court has stated on several occasions that this would be the preferred procedure.[212]

X. OBLIGATIONS OF THE PARTIES TO THE UNINSURED MOTORIST INSURANCE CONTRACT

Uninsured motorist coverage blends certain features of first party coverage claims and of third party coverage claims. As with a first party claim, the injured insured can sue the insurer directly.[213] Similar to a third party claim, the injured insured has the burden of proof and the process is adversarial within certain broad parameters. In an uninsured motorist case, the insurer must make a reasonable evaluation and offer once the insured has provided the information necessary to evaluate the claim. The insurer also has a duty to "explain" uninsured motorist coverage and the option of obtaining coverage up to the liability limits.[214] At the same time, the insured is obligated to pay premiums when due. The insured must also make a "reasonable effort" to determine the existence or nonexistence of liability insurance.[215] The insurer and insured also have mutual duties of good faith and fair dealing arising from the insurance contract.[216] Since the purpose of uninsured motorist coverage is to compensate the insured for damages caused by an uninsured motorist, it stands to reason that the insurer and the insured must both take reasonable steps to accomplish the purposes of the contract. While the Mississippi Supreme Court has not specifically addressed the scope of the insured's own duty of good faith and fair dealing under the uninsured motorist contract, the court would presumably recognize that the insured also has certain obligations to insure that the purposes of the uninsured motorist contract are accomplished. The insured's inherent duties in an uninsured motorist contract would presumably be no different than the inherent duties of any party to a contract. Therefore, a deliberate and egregious breach of these duties by the insured should expose the insured to the same breach of contract penalties as would any other similarly situated breaching party. Situations where an insured could be found to have breached his or her duty of good faith and fair dealing would be where the insured misrepresents the nature and duration of the injuries, misrepresents key facts, or fails to disclose previous similar injuries.[217]

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[208] *See* Lawler v. Government Employees Ins. Co., 569 So. 2d 1151, 1153 (Miss. 1990) (holding that insurance contracts are subject to general statute of limitations that generally governs negligence actions).

[209] *See* MISS. CODE ANN. § 15-1-49 (1999).

[210] *See* MISS. CODE ANN. § 15-1-59 (1999); *Lawler*, 569 So. 2d at 1153 (holding that statute of limitations applicable to claim of seventeen year old injured in automobile accident with uninsured motorist did not begin to run against her until she reached her twenty-first birthday).

[211] *See* Overstreet v. Allstate Ins. Co., 474 So. 2d 572, 577 (Miss. 1985).

[212] *See Overstreet*, 474 So. 2d at 577. "For the benefit of the bench, bar and the insurance industry in general, . . . [w]e repeat, and loudly, that such would be the preferred procedure in dealing with" such claims. *Id. See* United States & Fidelity & Guar. Co. v. Pearthree, 389 So. 2d 109, 113 (Miss. 1980) (noting that although not mandatory, judicial determination of heirs, upon administration of estate, would help avoid difficulties).

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[213] *See* Famed v. Aetna Cas. & Sur. Co., 263 So. 2d 790, 791 (Miss. 1972).

[214] *See* Aetna Cas. & Sur. Co. v. Berry, 669 So. 2d 56-76 (Miss. 1996) (holding that in order to change policy or reject uninsured motorist coverage, insurance agent must explain nature of coverage to insured).

[215] *See* State Farm Fire & Cas. Co. v. Magee, 368 So. 2d 230, 232 (Miss. 1979).

[216] *See* Morris v. Macione, 546 So. 2d 969, 971 (Miss. 1989) (holding that "all contracts contain an implied covenant of good faith and fair dealing").

XI. INTEREST

It appears that Mississippi Supreme Court applies the same standard for an award of interest in uninsured motorist cases as it does in any other contract case. According to the Mississippi Supreme Court:

> [W]hen there is a justifiable dispute as to the amount due, an insured is not entitled to interest until the amount due under the contract is made certain or liquidated unless the trial court in its discretion finds that the facts and circumstances of the particular case justify the allowance of interest prior to the judgment.[218]

Accordingly, so long as the uninsured motorist insurer does not act arbitrarily in refusing payment, then the insured is not entitled to pre-judgment interest.[219]

The Mississippi Supreme Court's refusal to award interest in the uninsured motorist context is somewhat surprising particularly in light of the generally paternalistic attitude it has taken toward insureds. From the standpoint of the injured insured, unless liability is disputed there would not appear to be any basis for refusing to award interest from the date the insurer makes its first settlement offer to the injured insured. Once this occurs, the injured insured has presumably complied with his or her obligations under the insurance contract. Furthermore, in most cases once an offer is made, at least some coverage is owed and the only unresolved question is the specific amount due. An award of interest seems particularly fair where the injured insured is a Class I insured who has paid premiums for the coverage. While the insurer is normally well within its rights in delaying payment until a jury determines the exact amount of damages, the insured arguably should be the one who benefits from the interest which accrues in the interim.

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[217] *See* Employers Mut. Cas. Co. v. Tompkins, 490 So. 2d 897, 906 (Miss. 1986) (stating that punitive damages are recoverable in UM context for same reasons as in any other breach of contract claim, i.e. where breach is result of intentional wrong, insult, abuse, or gross negligence rising to level of independent tort).

[218] State Farm Mut. Auto. Ins. Co. v. Bishop, 329 So. 2d 670, 673 (Miss. 1976). *See* Preferred Risk Mut. Ins. Co. v. Johnson, 730 So. 2d 574, 577 (Miss. 1998) (holding that prejudgment interest is not available where principal amount has not been fixed prior to judgment).

[219] *See* Dunnam v. State Farm Mut. Auto. Ins. Co., 366 So. 2d 668, 672 (Miss. 1979) (holding that where insurer knew that insured's damages exceeded uninsured motorist coverage and insurer refused to make payment, insured was entitled to prejudgment interest).

XII. COVERAGE FOR PUNITIVE DAMAGES

In Mississippi, uninsured motorist coverage will not cover an award of punitive damages against the at-fault party. The exclusion of coverage for punitive damages was decided in *State Farm Mutual Automobile Insurance Co. v. Daughdrill.*[220] In this case, the tortfeasor was intoxicated and had no drivers license.[221] After looking at the applicable statutes, the court concluded that punitive damages were not mentioned and that recovery of punitive damages from the insurer was not consistent with the expressed purpose of the uninsured motorist statutes.[222]

XIII. CONCLUSION

The Mississippi Supreme Court has consistently interpreted the uninsured motorist statutes so as to increase the situations where a person injured by a financially irresponsible motorist will be covered. The court has also increased the amount of coverage available through the numerous stacking decisions. However, an unfortunate side effect of these decisions is a body of law that is often confusing and counter intuitive. Unless and until the Mississippi Supreme Court makes significant changes in this area of the law, practitioners handling uninsured motorist cases will continue to struggle with the various issues and questions discussed in this article.

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[220] 474 So. 2d 1048 (Miss. 1985).

[221] *Daughdrill*, 474 So. 2d at 1050.

[222] *Id.* at 1054.

COMMENTS

SKIRTING THE MISSISSIPPI RULES OF EVIDENCE 404 CHARACTER PROHIBITION: ALLOWING PRIOR DRUG SALES TO COME IN UNDER THE GUISE OF "INTENT" IN PROSECUTIONS FOR POSSESSION WITH INTENT TO SELL

I. INTRODUCTION

You have been selected as a juror in a possession with intent to distribute trial. During the prosecution's case in chief, the prosecutor introduces evidence that the defendant has sold drugs in the past. The judge tells you to apply this knowledge of past sales only to the question of whether the defendant had the requisite intent to sell the drugs he most recently has been caught with. His prior bad acts are not to be considered when determining his guilt for the charged crime. Would you be able to separate the two? Would this knowledge of the defendant's drug-dealing character sway your opinion as to the current charge? Should this evidence be admissible at all? Such evidence will almost always be prejudicial to the defendant, especially when the defendant is involved in the drug trade.[1] Nevertheless, Mississippi allows this evidence, so long as the evidence is admitted for reasons other than to show the defendant's propensity to engage in that type of behavior.

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[1] *See* Russell G. Donaldson, *Admissibility, Under Rule 404(b) of Federal Rules of Evidence (28 U.S.C.A. Appx, Federal Rules of Evidence, Rule 404(b)), of Evi-*

On September 24, 1985, the Mississippi Supreme Court entered an order adopting the Mississippi Rules of Evidence.[2] Prior to the adoption of these rules, Mississippi lawyers had to combine their knowledge of various statutory provisions scattered throughout the Mississippi Code with existing case law to understand fully the evidentiary law in the state.[3] Modeled on the Federal Rules,[4] the court intended these standards to promote the fair and efficient administration of justice in the courts of the State of Mississippi.[5] A study of the rules shows while many of them provide concrete specifications, a large number of them leave room for judicial discretion and subjective interpretation. Rule 404(b) of the Mississippi Rules of Evidence particularly stands out as one to invite debate and review. The scope of Rule 404(b)[6] gets more complex when the rule is applied in the context of cases involving the sale of narcotics to determine whether the defendant's prior involve-

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dence of Accused's Prior Use of Illegal Drugs in Prosecution for Conspiracy to Distribute Such Drugs, 114 A.L.R. FED. 511 (1993). While such evidence has varying probative value depending on the circumstances, it is always prejudicial to the defendant. *Id.*

[2] *Preface to the* Mississippi Rules of Evidence, *available in* 474-77 So. 2d (Miss. Cases) XXVII-XXVIII (Miss. 1986). Although the Order was entered on September 24, 1985, it did not go into effect until January 1, 1986. *Id.* at XXVII.

[3] CAROLYN ELLIS STATON, *Preface to the Third Edition of* MISSISSIPPI EVIDENCE (3d ed. 1995). Practice in Mississippi was further complicated with the 1975 passage of the Federal Rules of Evidence, leaving the lawyer practicing in both state and federal courts with two evidentiary systems to handle. *Id.*

[4] Although generally mirroring the federal rules, the Mississippi Supreme Court did make some distinguishing changes. *See* MISS. R. EVID. 104(b) (Mississippi allows instructing jury to disregard evidence if relevancy of evidence not established); MISS. R. EVID. 404(b) (federal courts require reasonable notice in advance of trial if prosecution intends to use "other crimes" evidence [when requested by accused]); MISS. R. EVID. 611(b) (Mississippi allows wide-open cross; federal courts limited to subject matter of direct); *see also* MISS. R. EVID. 412, 501, 601, 703 and 1101 (federal rules and Mississippi rules are distinctly different in these areas).

[5] *See Preface, supra* note 2.

[6] Unless otherwise specified, the term "Rule 404(b)" may refer to either the Mississippi Rule or the Federal Rule.

ment in drug sales is admissible to show intent.[7]

Rule 404(b), often called the "propensity rule,"[8] forbids character inferences based on bad-acts evidence.[9] While admission of evidence of other bad acts or crimes will almost always have some prejudicial effect, it will often have some probative value as well. The degree of prejudice to the defendant versus the probative value of evidence to the prosecution will vary based on the type crime for which the defendant is on trial. Because of the public's awareness of the current drug crisis and abhorrence of drug dealers prejudice will almost certainly be great where such evidence is of prior sales of illegal drugs by the defendant, when such activity is introduced in a prosecution for possession with intent to distribute illegal drugs.[10] To comply with Rule 404(b), courts must refuse to admit any evidence whose relevance depends on propensity reasoning.[11] However, Mississippi's courts often choose to look the other way and have very recently allowed such evidence to be presented in drug cases.[12]

This comment will analyze Rule 404(b) of the Mississippi Rules of Evidence as it applies to admissibility, in prosecution for illegal sale of narcotics, of evidence of other sales when the other sales are offered to prove intent. It will discuss in detail Mississippi's treatment of this issue and the strengths and weaknesses of the courts' application of Rule 404(b) to prior drug sales. This comment will review the other purposes under Rule 404(b) and their application in Mississippi courts. Finally, it will show a way to maintain the standards enumerated in Rule 404 and keep evidence of prior drug sales out of possession with intent cases that would otherwise violate the propensity rule by coming in under the guise of intent.

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[7] *See* Holland v. State, 656 So. 2d 1192 (Miss. 1995); Smith v. State, 656 So. 2d 95 (Miss. 1995); Perry v. State, 637 So. 2d 871 (Miss. 1994); Bryant v. State, No. 95-KP-00816 COA, 1998 WL 850105 at *1 (Miss. App. Dec. 8, 1998); Burrell v. State, 727 So. 2d 761 (Miss. App. 1998).

[8] *See* Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 181-82 (1998). The "propensity" rule is codified in the first sentence of Rule 404(b). *Id.* at 181-82.

[9] *Id.* at 182-83. This rule against forbidden reasoning was borrowed from England. *Id.* at 205.

[10] *See* Donaldson, *supra* note 1, at 511.

[11] *See* Morris, *supra* note 8, at 189. There is abundant evidence, however, that courts routinely admit such evidence. *Id.*

[12] *See* Bryant, 1998 WL 850105 at *6-*7 (holding evidence of prior arrest and conviction of possession of cocaine with intent to distribute admissible for purpose of proving intent).

II. PROPENSITY V. INTENT: RULE 404(B) AND ITS APPLICATION TO CASES INVOLVING THE ILLEGAL SALE OF NARCOTICS

Although character evidence is not admissible for the purpose of proving that a person acted in conformity therewith,[13] Rule 404(b) has a provision that admits other crimes, wrongs, or acts for other purposes.[14] Of the purposes listed

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[13] MISS. R. EVID. 404(a). This prohibition is found in Rule 404 of the Mississippi Rules of Evidence. The pertinent text of the rule states: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. . ." MISS. R. EVID. 404(a).

The comment observes that character evidence may arise in three different ways:

> (1) when character is an issue in a case;
> (2) when the character of a witness is impugned for lack of veracity; and
> (3) when the character of a party is being used as the basis for an inference that he behaved in the instant case as he did on prior occasions.

MISS. R. EVID. 404 cmt. a.

[14] The text of Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

MISS. R. EVID. 404(b).

The comment notes that the past acts introduced into evidence "may be ones for which the person in question was either convicted or not convicted." MISS. R. EVID. 404(b) cmt. b. The exceptions listed in subsection (b) of the rule are not exclusive. *Id.*

The English rule from which ours is based strikingly parallels the two sentences of Rule 404(b). Morris, *supra* note 8, at 206. In an 1894 decision, an English court held that

> [i]t is undoubtedly not competent for the prosecution to adduce evidence tending to shew [sic] that the accused has been guilty of criminal acts

that will satisfy the admissibility requirement, the use of bad-acts evidence to prove the mental element of an offense or tort, i.e. "intent," is the most common.[15] An effective prosecutor should have little trouble using intent as a basis to support the admissibility of the defendant's extrinsic act, particularly if the act is some sort of conviction.[16] In fact, the use of a

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> other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence [sic] for which he is being tried. . . [T]he mere fact that the evidence adduced tends to shew [sic] the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence [sic] which would otherwise have been opened to the accused.

Id. (quoting Makin v. Attorney General for New South Wales, [1894] App. Cas. 57).

[15] Morris, *supra* note 8, at 190. In the years preceding the adoption of Rule 404, general federal practice did not allow admission of other crimes evidence to prove intent unless intent was more than just a formal issue. Thomas J. Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. 113, 119 (1984). If the defendant stipulated that he had the requisite intent at the time the acts charged were committed, intent would not be an issue in the case and evidence of other crimes would be barred. *Id.*

Likewise, in Mississippi, prior to the adoption of the rules the courts would not allow the State to adduce evidence tending to show that the defendant had a prior predisposition to commit the offense charged. Hamilton v. State, 295 So. 2d 739, 741 (Miss. 1974). Mississippi had a well settled general rule stating that

> [T]he issue on a criminal trial should be single and that the testimony should be confined to that issue and on the trial for one offense the prosecution should not be allowed to aid the proof against the defendant by showing he committed other offenses, even though of a like nature.

Sumrall v. State, 257 So. 2d 853, 854 (Miss. 1972). *See also* Cummings v. State, 219 So. 2d 673, 676 (Miss. 1969) (stating general rule is that, on the trial of one charged with a particular crime, evidence must be confined to issue joined as to that specific offense and that showing accused's guilt of another offense is incompetent); Ladnier v. State, 182 So. 2d 389, 391 (Miss. 1966) (holding it error to admit testimony relating to previous crime allegedly committed by defendant); Brown v. State, 80 So. 2d 761, 761-62 (Miss. 1955) (holding evidence in criminal case must be confined to point in issue and proof of crimes distinct from that alleged indictment should not be admitted in evidence against accused).

[16] *See* Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 579-80 (1985). An imaginative prosecutor should have little trouble articulating some noncharacter purpose for which any particular specific act is relevant. Richard B. Kuhns, *The Propensity to*

defendant's other crimes to prove intent is already the most widely used basis for admitting uncharged misconduct evidence.[17] Defendants, who find themselves in federal court and who have been charged with possession of narcotics with intent to distribute, may expect that their prior arrests and convictions for sale of drugs will be admitted for the purpose of intent in evidence against them.[18] As the law stands today, defendants who find themselves in Mississippi courts might find themselves subject to the same treatment.

III. THE STANDARD IS SET: *SMITH V. STATE*

Since the passage of the Mississippi Rules of Evidence in 1985, the Mississippi Supreme Court has had numerous occasions to interpret and explicate the rules.[19] In the oft-cited case of *Smith v. State*,[20] the court laid out its guidelines for the admissibility of prior drug sales to show intent to distrib-

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Misunderstand the Character of Specific Acts Evidence, 66 IOWA L. REV. 777, 799 (1981).

[17] *See* Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 576 (1990). Alleged errors in the admission of uncharged misconduct evidence are the most common ground for appeal and the most frequent basis for reversal in some jurisdictions. *Id.* at 577.

[18] Reed, *supra* note 15, at 120. *See, e.g.*, United States v. Hardwell, 80 F.3d 1471, 1489 (10th Cir. 1996) (holding prior incidents involving defendant clearly tended to show his involvement in drug distribution and were therefore relevant to intent in drug prosecution); United States v. Zanabria, 74 F.3d 590, 592 (5th Cir. 1996) (admitting evidence of prior cocaine possession conviction for intent purposes in prosecution for possession with intent); United States v. Mitchell, 49 F.3d 769, 775-77 (D.C. Cir. 1995) (admitting evidence of earlier drug transaction for intent purposes in prosecution for conspiracy to possess and distribute cocaine). *See also* United States v. Holman, 680 F.2d 1340, 1349 (11th Cir. 1982) (admitting evidence of defendants' previous attempts to smuggle marijuana for intent and similarity purposes in prosecution for conspiracy to possess and distribute marijuana); United States v. Jones, 676 F.2d 327, 332 (8th Cir. 1982) (admitting evidence of prior dealings in cocaine for intent purposes in prosecution for possession of marijuana with intent to distribute).

[19] STATON, *supra* note 3. Professor Staton notes that the court has been quite active when ruling on matters regarding Rule 609, Rules 404-405, and Articles VII and VIII. *Id.*

[20] 656 So. 2d 95 (Miss. 1995).

ute in a possession with intent case. In *Smith*, the defendant was convicted of possession of crack cocaine with the intent to distribute.[21] The defendant appealed the conviction, arguing, inter alia, that the lower court erred in admitting evidence of other drug sales that were remote in time on the issue of intent and alleging that the lower court erred in not giving a limiting instruction on the purpose for which the other crimes evidence was admitted.[22] The court held that evidence of prior acts offered to show intent to distribute is not barred by Rule 404 of the Mississippi Rules of Evidence and is properly admissible if it passes muster under Rule 403 of the Mississippi Rules of Evidence.[23] The admitted evidence must also be accompanied by a proper limiting instruction.[24] The court realized the difficulty of proving subjective intent and found no reason to categorically exclude evidence of prior sales.[25] However, the court limited the admissibility of the evidence of past sales. The court held that while past drug activity is admissible, past sales alone is an insufficient evidentiary basis for the conclusion that present possession carries with it the intent to distribute.[26]

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[21] *Id.* at 97. Smith was arrested during a large-scale "round up" and was found in possession of a vial containing sixteen pieces of crack cocaine. *Id.*

[22] *Id.* The trial court admitted the testimony under the Rule 404(b) exception for prior acts offered to show intent; the trial judge, after conducting a Rule 403 balancing test, found the evidence more probative than prejudicial and therefore properly admitted. *Id.* at 98.

[23] The text of Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MISS. R. EVID. 403.

[24] *Smith*, 656 So. 2d at 99. The court reasoned that its holding was "in line with the great weight of authority construing the federal counterpart and genesis of Mississippi's Rule 404(b)." *Id.* The court recognized that the ultimate resolution of the issue depended on the purpose for which the testimony was offered with propensity being the only proscribed purpose. *Id.* Even though the State contended that the testimony was offered for the purpose of showing intent, the court realized the difficulty in distinguishing that purpose from the propensity purpose. *Id.* As a result, the court indirectly formulated the three-part analysis used when determining admissibility of testimony regarding prior drug sales. *Id.*

[25] *Id.* In prior opinions, the court had indicated that previous involvement with drugs could be admitted on the issue of intent to distribute. *See* Jowers v. State, 593 So. 2d 46, 47 (Miss. 1992) (holding where contraband is present in an amount which a person could reasonably hold for personal use, other evidence of possible involvement in the drug trade may be sufficient to establish intent).

The holding in *Smith* enumerated a three-pronged requirement for admissibility of prior drug sales to show intent to distribute:[27] (1) evidence of past sales *plus* additional probative evidence must be shown,[28] (2) probative value must outweigh prejudicial effect per Rule 403,[29] and (3) the jury must be informed as to the limited purpose for which they are allowed to consider the other-crimes evidence.[30] Although all three parts of the requirement must be met for the admissibility of the evidence, each requirement warrants its own discussion to determine the boundaries of the court's intentions.

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[26] Smith v. State, 656 So. 2d 95, 100 (Miss. 1995). To hold otherwise would be truly to convict on the basis of propensity. *Id.* The court did not allow the defendant's past sales into evidence because proof of past sales was the only evidence truly probative of the defendant's intent to distribute. The conviction for possession with intent to distribute was reversed and remanded for sentencing on the possession charge. *Id.* at 101-02.

[27] This three-pronged Mississippi test differs slightly from the two-pronged test used in the Fifth Circuit, as enumerated in United States v. Route, 104 F.3d 59, 63 (5th Cir. 1997). The Fifth Circuit's test for admissibility requires consideration of (1) whether the evidence is relevant to an issue other than the defendant's character and (2) whether the evidence possesses probative value that is not outweighed substantially by the danger of unfair prejudice and is otherwise admissible under Rule 403. *Id.*

In Huddleston v. United States, 485 U.S. 681 (1988) the Supreme Court developed a four-part test to determine when evidence of prior crimes may be admitted:

> (1) the evidence must be offered for a proper purpose;
> (2) the evidence must be relevant under Rule 402;
> (3) a Rule 403 analysis must be done to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and
> (4) upon request, a limiting instruction must be given to the jury.

Id. at 691-92.

Other circuits have also developed their own procedures. *See, e.g.*, United States v. Conway, 73 F.3d 975, 981 (10th Cir. 1995) (adopting the Supreme Court's test); United States v. Aramony, 88 F.3d 1369, 1377 (4th Cir. 1996) (using four-pronged test of relevancy, necessity, reliability, and Rule 403 balancing).

[28] *See supra* note 26 and accompanying text.

[29] *Smith*, 656 So. 2d at 99. "Rule 403 is an ultimate filter through which all other admissible evidence must pass. . . [T]he weighing and balancing task assigned by Rule 403 is not one susceptible of mechanical performance." Jenkins v. State, 507 So. 2d 89, 93 (Miss. 1987).

[30] *See supra* note 24 and accompanying text.

A. The First Prong: Past Sales Plus Additional Evidence

Determining what other evidence is required to meet this first factor entails looking at the circumstances surrounding arrests. Although *Smith* and subsequent Mississippi cases addressing the prior drug sales/intent issue do not give concrete guidelines, comments by the court indicate what could satisfy this sufficiency test.[31] When looking for evidence that would have additional probative value, prosecutors might look to (1) whether the amount of drugs recovered is more than could be expected for personal use, (2) whether the amount of cash found on a person is significant, (3) whether the tools of the trade of narcotics activity were found,[32] and (4) whether there was any evidence of sales near the time of the arrest.[33] Evidence of one or more of these factors incident to arrest should be enough, along with prior drug sales, to prove intent.

If such evidence is present, why does the State need to introduce prior drug sales at all? If the State is truly concerned about the prejudicial effect a defendant's prior drug dealing would have on a jury, it probably could stop the analysis here. If any of the first three factors listed in the above paragraph have been met, the question of intent to sell will be answered. There would be no need to introduce evidence of prior sales by the defendant. Evidence that the defendant had in his possession, at the time of his arrest, an inordinate amount of cash or drugs and drug scales or paraphernalia would, in and of itself, show intent. The only limited exception would be evidence of sales near the time of the arrest, so long as at the time of the arrest, no other probative evidence is found on the defendant.[34] The three-pronged Rule 404(b) requirement should not be the rule in Mississippi; it should be the exception. The only other way evidence of prior sales should be allowed to show intent, absent any exceptions, would be if the prosecution proved, in a pretrial hearing, that such evidence would be substantially necessary to prove possession with the intent to sell.[35]

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[31] Mississippi cases subsequent to *Smith* addressing the issue of admissibility of prior drug sales to show intent have failed to state what other evidence is necessary to meet the first-prong requirement. *See* Holland v. State, 656 So. 2d 1192, 1196 (Miss. 1995) (reversing a conviction for possession with intent to distribute when evidence of past sales alone was the only remaining evidence supporting the conviction). In fact, in *Bryant v. State*, No. 95-KP-00816 COA, 1998 WL 850105 at *7 (Miss. App. Dec. 8, 1998), the court allowed a prior possession with intent conviction in as evidence to prove intent seemingly without any collateral evidence having been shown or proven. *Id.*

[32] *See Smith,* 656 So. 2d at 100. The court found that the defendant's possession of cocaine was unremarkable in either quality or circumstance. *Id.* The amount was no more than could be expected for personal use, the amount of cash found ($93) was insignificant, and no tools of the trade were found. *Id.*

[33] *See Holland,* 656 So. 2d at 1196. The court stated there was inconclusive evidence as to whether there were sales within close temporal proximity to the arrest. *Id.*

B. The Second Prong: Rule 403 Analysis

To be admissible as evidence, prior acts offered to show intent to distribute must pass muster under Rule 403.[36] The standards will not be met if the evidence's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.[37] The language of Rule 403 explicitly invites much judicial discretion.[38]

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[34] If any of the other probative evidence (large amounts of money, large amounts of drugs, paraphernalia, etc.) are present, there is no need to show the prior sales evidence. In *United States v. Jones*, 913 F.2d 1552 (11th Cir. 1990), the court ruled that evidence of prior sales was admissible to prove intent to sell. *Id.* at 1566. The court found that the probative value outweighed the prejudicial effect because the extrinsic and charged offenses were similar and the amount of time separating them was not great. *Id.*

[35] Note that the prosecution will still, in all cases, have to show more than just past sales. *See* Smith, 656 So. 2d at 100. By having this settled outside the hearing of the jury, the courts can avoid the potential for prejudice that is inherent in a drug case. If the prosecution can show that evidence of prior sales is necessary to prove their case, the courts would still need to do a Rule 403 balancing test, and then, if the evidence is found to be more probative than prejudicial, provide the jury with a limiting instruction. For an analysis of other exceptions, *see infra* notes 63-72 and accompanying text.

[36] *See* Smith, 656 So. 2d at 99. *See also* Holland, 656 So. 2d at 1196.

[37] *Smith*, 656 So. 2d at 99. In *Smith*, the trial court ruled that the probative value of the defendant's prior drug sales outweighed the unfair prejudicial effect

Allowing a jury to hear evidence of prior drug sales carries great danger of unfair prejudice[39] because the prior crime is identical to the charged crime.[40] Upon hearing this evidence, the jury will likely infer that the defendant is a "drug pusher" and proceed to convict him impermissibly on evidence of his bad character rather than because the evidence proves him guilty of the charged offense.[41] Persuasiveness of other-crimes

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this evidence had on his defense; as a result the Mississippi Supreme Court did not address this issue on appeal. *Id.* They did, however, note that the trial court's decision was "somewhat dubious." *Id.* Because the evidence of past sales was the only remaining evidence supporting the conviction in *Holland* (thus not meeting the first prong of the test), the court in that case did not have the opportunity to conduct a Rule 403 analysis. *Holland,* 656 So. 2d at 1196.

[38] *See* David Robinson, Jr., *Old Chief, Crowder, and Trials by Stipulation,* 6 WM. & MARY BILL RTS. J. 311, 333 (1998). Although the word "discretion" does not appear in the rule, the word "may" allows and invites judicial discretion. *Id.* at 334.

[39] "Unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily an emotional one." Robinson, *supra* note 38, at 325-26. There are three instances from which unfair prejudice may arise:

> (1) when evidence is presented that is so likely to elicit an intense emotional response (anger, horror, disgust, etc.) as to detract from the truth-seeking function of the trial [as would be the case with drug dealers];
> (2) when evidence is introduced that that seems likely to encourage a decision on an incorrect basis (such as conclusion that person is bad or dangerous and "should be put away irrespective of his guilt of the crime charged") [also applicable to drug dealers]; and
> (3) when evidence is introduced that is likely to be overvalued by the trier of fact assessing its probative force [as in reprehensible crimes such as drug dealing].

Id. at 326.

[40] *See* McInnis v. State, 527 So. 2d 84 (1988). In *McInnis,* one of the issues was whether prior crimes could be brought in as evidence to impeach the defendant's veracity. *Id.* at 87-89. The court held that a five-step balancing test should be done to see if the probative value of the admission would outweigh its prejudicial effect. *Id.* at 87. One of the five balancing factors the court considered was the "similarity between the past crime and the charged crime." *Id. Cf. Smith,* 656 So. 2d at 100 ("No meaningful distinction exists between Rule 609 impeachment evidence and Rule 404 evidence.").

[41] *See* Calvin W. Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof,* 59 NOTRE DAME L. REV. 556, 566 (1984). Sharpe writes that "[t]he probative value of all character evidence, includ-

evidence often rests upon the strength of the inference that the same intent fueled both the prior offense and the charged offense.[42] At the same time, there is great potential for a jury to misuse evidence of other similar crimes by inferring the defendant's disposition from it or by considering the evidence cumulatively.[43] It is irrelevant whether the evidence of prior drug sales is either non-convicted "bad-act" evidence or evidence of a crime for which the defendant has been convicted; a jury will still be prejudiced towards the defendant.[44] Furthermore, the impact of the prejudice is virtually impossible to reverse once the jury has been presented with the evidence.[45]

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ing evidence of other crimes, is often not very great, while it usually will have substantial prejudicial effects." *Id.* at 560. More subtly, a jury, upon hearing evidence of a prior bad act, may become apathetic to a defendant and become less concerned about reaching a wrong verdict. *Id.* at 566.

[42] *See* Sharpe, *supra* note 41, at 581. Because of the need to show the same intent prosecutors often rely on the similarity between the crimes. *Id.*

[43] *Id.* at 581-82. *See* United States v. Beechum, 582 F.2d 898, 915 n.20 (5th Cir. 1978). The court stated that "[t]he likelihood that the jury will convict the defendant because he is the kind of person who commits this particular type of crime or because he was not punished for the extrinsic offense increases with the increasing likeness of the offenses." *Id.*

Highly similar evidence of other crimes may also increase the probative value of the evidence in some cases where the other-crimes evidence is being offered for intent purposes. Sharpe, *supra* note 41, at 597 n.48. This simultaneous rise in probative value and prejudice further complicates the balancing analysis. *Id.*

[44] *See* Imwinkelried, *supra* note 17, at 580-81. In fact, when presented with uncharged misconduct evidence, a jury may be under the impression that the defendant unjustly escaped punishment for uncharged misdeeds and got away with it. *Id.* The jurors may be tempted to correct that injustice by punishing the accused now for wrongful acts committed in the past, even though they might have reasonable doubt about the accused's guilt of the charged offense. *Id.* at 581.

For an excellent hypothetical showing how a jury might make such inferences, *see* Sharpe, *supra* note 41, at 559-63.

[45] Thomas M. DiBiagio, *Intrinsic and Extrinsic Evidence in Federal Criminal Trials: Is the Admission of Collateral Other-Crimes Evidence Disconnected to the Fundamental Right to a Fair Trial*, 47 SYRACUSE L. REV. 1229, 1239 (1997). DiBiagio writes that "it is a complete fiction that cautioning the jury not to infer guilt in the charged offense from the evidence of [a] prior . . . act[] will sufficiently mitigate the prejudicial impact." *Id.* *See* United States v. Johnson, 27 F.3d 1186, 1193 (6th Cir. 1994) (stating when prior acts evidence is introduced, likelihood is great that jurors will use it improperly to suggest that defendant is a convicted criminal and that if he did it once, it is likely that he will do it again).

Justice Jackson recognized this problem in 1948 when he wrote the opinion

One cannot "unring a bell."[46]

When the courts conduct a Rule 403 balancing test, they must make quick, conjectural, and experienced estimations of the impact of items of evidence, their probative value, and their tendency to result in unfair prejudice.[47] With high-prejudice crimes such as drug dealings, courts should make the effort to ensure that the occurrence of the previous bad acts is convincingly proven.[48] The court should then consider other prejudicial factors such as similarity or reprehensibility of the crime.[49] If the potential probative value of the prior-crimes evidence is high enough to survive this analysis, the judge should then consider whether the prior acts evidence offered to prove intent is strong enough to support an inference that

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to *Michelson v. United States*, 335 U.S. 469 (1948). Justice Jackson stated:

> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise, and undue prejudice.

Id. at 475-76 (footnotes omitted).

[46] Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962). Even better stated: "[A]fter the thrust of the saber it is difficult to say forget the wound" and "if you throw a skunk into the jury box, you can't instruct the jury not to smell it." *Id.*

[47] Robinson, *supra* note 38, at 328. Judges are not able to test their theories by going behind the jury room door to determine what influences juror's decisions and in what way. *Id.* This problem is magnified by the increasing diversity of jury members. *Id. See also* David Robinson, Jr., *The Shift of the Balance of Advantage in Criminal Litigation: The Case of Mr. Simpson*, 30 AKRON L. REV. 1, 9 (1996) (inferring that the racial makeup of a jury can have a significant effect on the outcome of the case).

[48] Sharpe, *supra* note 41, at 586. Higher certainty increases the probative value of the other-crimes evidence. *Id.*

[49] *Id.* at 585. Other external factors should also be considered, such as potential for confusing or misleading the jury, and whether the defendant can effectively rebut evidence of other crimes without unduly delaying the final resolution of the case. *Id. See also supra* note 40 and accompanying text.

the defendant actually committed the charged crime.[50] In other words, if the prior bad acts evidence introduced to show intent is not probative enough to show intent to sell in the present crime, the prior acts will not be admissible.

Under the Rule 403 balancing test, absent any exceptions,[51] one is hard pressed to see how evidence of prior drug sales introduced to show intent can *ever* be more probative than prejudicial.[52] The act of selling drugs is a highly reprehensible crime, one that naturally has a tendency to prejudice jurors.[53] The crimes are so identical in nature that juries will have a difficult time distinguishing one from the other. In Mississippi, it has already been established that evidence of prior sales alone is not probative enough to prove intent to sell; additional evidence is needed.[54] Once the prosecution has introduced this other evidence,[55] there is no need for a jury to hear evidence of prior sales. This supplemental evidence will have already satisfied the probative requirement, and there will be no risk of prejudice to the defendant. A correct Rule 403 analysis will exclude prior acts evidence offered to show intent to sell drugs, limiting instructions notwithstanding.

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[50] *Id.* at 586. The potential probative value of the other-crimes evidence should then be reduced by the unavailable or missing proof supporting the other-crimes evidence. *Id.*

This analysis works when applied to the *Smith* case. *See Smith*, 656 So. 2d at 95. Although there was strong evidence that the defendant had dealt drugs in the past, the probative value of the past acts was eclipsed by the prejudicial effect because the "[prior acts] alone [were] an insufficient evidentiary basis for the conclusion that present possession is with the intent to distribute." *Id.* at 100. Even so, the court failed to address the reprehensibility factor that biases juries towards drug dealers and the probative/prejudicial balancing of that issue.

[51] *See infra* notes 64-70, 73 and accompanying text.

[52] Yet the Mississippi courts continue to rule that such evidence is more probative than prejudicial. *See, e.g., Smith*, 656 So. 2d at 99 (trial court ruled that probative value of two previous drug sales outweighed unfair prejudicial effect); Bryant v. State, No. 95-KP-00816 COA, 1998 WL 850105 at *7 (Miss. App. Dec. 8, 1998) (prior arrest and conviction of possession with intent to distribute admissible to prove intent under Rule 404(b)).

[53] *See supra* notes 1, 10 and accompanying text.

[54] *See supra* notes 26-28 and accompanying text.

[55] *See supra* note 33 and accompanying text.

C. The Third Prong: Requirement of a Limiting Instruction

Before a prior bad act can be admissible as evidence to prove intent, the judge must inform the jury as to the limited purpose for which they are allowed to consider the other-crimes evidence.[56] Because of the great risks involved in the use of prior offenses to establish intent the courts have a duty to insure that a cautionary instruction is submitted to the jury.[57] Although established as a procedural safeguard, the inadequacy of the limiting instruction has been the subject of discussion for some time.[58]

Limiting instructions given in the context of prior-crimes evidence are especially inefficacious.[59] Studies have shown that once a jury hears a defendant's past criminal record, the jury will form conceptions of the evidence and/or the defendant that influence the verdict, and limiting instructions regarding the proper use of that prior record will not erase those conceptions from the jurors' memories.[60] In fact, some researchers suggest that once a juror hears a fact it is improbable for him to ignore its effect because that fact will influence the way the juror thinks of the case as a whole.[61] While limiting instructions are designed to reduce prejudice resulting from prior convictions, they in fact can increase prejudice by calling the jury's attention to the prior convictions and bad acts.[62] Even though limiting instructions may appear valuable on their face, they become worthless if juries are unable to follow them.[63]

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[56] *Smith,* 656 So. 2d at 99. With the decision in *Smith,* trial judges are now required to give a limiting instruction sua sponte unless the party objecting to the evidence objects to the giving of the limiting instruction. *Id.* at 100. *See also* Bounds v. State, 688 So. 2d 1362, 1371-72 (Miss. 1997) (recognizing that, post-*Smith,* courts are required to give limiting instruction).

[57] *Smith,* 656 So. 2d at 100. The court alluded to the similarity of the crimes and the potential for abuse or confusion by the jury. *Id.*

[58] In 1932, Judge Learned Hand discussed the fallaciousness of the limiting instruction in *Nash v. United States,* 54 F.2d 1006 (2d Cir. 1932), when he called such instructions "recommendation[s] to the jury of a mental gymnastic which is beyond, not only their powers, but anybody[] else['s]." *Id.* at 1007. Judge Hand has labeled the procedure a legal "placebo." United States v. Delli Paoli, 229 F.2d 319, 321 (2d Cir. 1956). See also *Krulewitch v. United States,* 336 U.S. 440 (1949), where Justice Jackson stated, "[T]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be an unmitigated fiction." *Id.* at 453 (Jackson, J., concurring) (citation omitted).

[59] *See* Anthony N. Doob & Hershi M. Kirshenbaum, *Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused,* 15 CRIM. L. Q. 88, 93 (1972) (noting mock jurors given limiting instruction about defendant's prior convictions gave defendant higher guilt rating than jurors who learned of convictions but were not given limiting instruction).

Courts have noted that such instructions may not be sufficient when evidence of prior crimes is introduced. *See, e.g.,* Government of Virgin Islands v. Pinney, 967 F.2d 912, 918 (3d. Cir. 1992) (noting there are situations in which the risk that jury will ignore court's instructions is very high); United States v. DeCastris, 798 F.2d 261, 264 (7th Cir. 1986) (stating instructing jury to keep out "bad character" evidence is "like telling someone not to think about a hippopotamus").

If Mississippi courts perform a correct Rule 403 balancing test, the evidence of prior sales should not make it past the Rule 403 analysis, and there will be no need for a limiting instruction. However, if the prosecutor has successfully made its pretrial argument that prior-crimes evidence is substantially necessary to seek a conviction, a limited instruction may be required. A limiting instruction will also be needed when the admissibility of the prior-crimes evidence meets one of the 404(b) other purposes.

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[60] Lisa Eichorn, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 LAW & CONTEMP. PROBS. 341, 345 (1989). Thus, limiting instructions will have little effect on the outcome of a trial because jurors will have trouble forgetting evidence for one purpose and remembering it for another. *Id.*

[61] *Id.* at 344-45. The more inferences that arise from a particular piece of evidence the more difficult it will be to negate the effects of that evidence by means of a simple limiting instruction. *Id.* at 345.

[62] *See* Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 555 (1992). Most jurors may know that they should not assume guilt based on prior convictions, but they tend to do so despite this knowledge. *Id.* at 572 n.96.

[63] *See* Eichorn, *supra* note 60, at 342. The author identified the following factors as having at least some impact upon the jury's ability to follow instructions to disregard evidence or to use it for limited purposes:

> (1) repetition of the inadmissible evidence at trial;
> (2) perceived salience of the evidence;
> (3) style and level of insistence of the judge in delivering the instruction to disregard;
> (4) jurors' perceptions of an invasion by the judge of their role in the decision process;
> (5) jurors' understanding of and agreement with policies underlying exclusionary rules; and
> (6) jurors' comprehension of language used in instructions.

Id. at 349.

IV. OTHER PURPOSES FOR PRIOR BAD-ACTS EVIDENCE UNDER RULE 404(B)

Proper application of the three-pronged *Smith* test should keep prior-bad acts evidence out in most possession with intent cases. "Other purposes" may, under the rule, justify admissions of other crimes.

Prior acts evidence will be admitted if the accused raises the defense of entrapment.[64] The very idea of entrapment suggests that the defendant would never have committed the crime had he not been persuaded or otherwise enticed.[65] A defendant claiming entrapment "must withstand a searching inquiry into his past conduct directed towards showing his predisposition to commit the crime charged."[66]

Similarly, a Rule 404(b) analysis will not be necessary when the defendant "opens the door" proclaiming a clean record and puts the prior-crimes evidence at issue. A defendant may put his prior crimes at issue during voir dire[67] or during direct examination (where some such evidence may be admitted for impeachment purposes).[68] The door may also be opened if the defendant claims insanity[69] or makes more than a merely formal issue of lack of intent.[70]

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[64] *See* Sanders v. State, 678 So. 2d 663, 668 (Miss. 1996) (holding that predisposition evidence is admissible when entrapment is raised as a defense); Moore v. State, 534 So. 2d 557, 558-59 (Miss. 1988) (stating "where entrapment is pled as a defense, evidence of predisposition is always relevant and, hence, always admissible.")

[65] *Moore*, 534 So. 2d at 559. *See also* Sayre v. State, 533 So. 2d 464, 466 (Miss. 1988) (holding other similar acts committed by defendant in the past have a tendency to show predisposition).

[66] Reed, *supra* note 15, at 121. The State may offer evidence of the defendant's predisposition to commit the crime charged. *Id.*

[67] Townsend v. State, 681 So. 2d 497, 505 (Miss. 1996). In a prosecution for possession of methamphetamine, the defense counsel, during voir dire, told the jury that the case was not one of marijuana possession, but of methamphetamine possession. *Id.* The court ruled that this opened the door and allowed evidence regarding the marijuana possession in. *Id.*

[68] Quinn v. State, 479 So. 2d 706, 708 (Miss. 1985). The defendant was on

Prior-acts evidence may also be admissible if it is intrinsic to the crime charged. Evidence is intrinsic when it is directly connected to the factual circumstances and operative facts of the offense for which a defendant is charged.[71] Prior-crimes evidence is intrinsic and thus admissible if it is "inextricably

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trial for selling marijuana to an undercover agent. *Id.* at 707. While on trial, the defendant, while being questioned by his own attorney, categorically denied selling drugs in the past. *Id.* at 708. In so doing, the court held that the defendant opened the door for the State to attack his credibility by questioning him about a drug sale he made prior to the one for which he was on trial. *Id.*

[69] Reed, *supra* note 15, at 123. Under the Federal Rules of Evidence, if the defendant claims that he is incapable of intent because of insanity, the courts generally allow evidence that the defendant previously had committed similar acts. *Id. See, e.g.*, United States v. Emery, 682 F.2d 493, 497 (5th Cir. 1982) (admitting evidence of prior robbery when defendant claimed insanity for recent robbery); United States v. Madrid, 673 F.2d 1114, 1122 (10th Cir. 1982) (admitting evidence of prior robbery when defendant claimed insanity for recent robbery).

[70] Reed, *supra* note 15, at 124-25. This will occur when evidence shows that the defendant had made arrangements to sell drugs on prior occasions. This evidence will be admissible to rebut contention of lack of intent in charged case. *See, e.g.*, United States v. Dolliole, 597 F.2d 102, 106 (7th Cir. 1979) (admitting evidence that defendant had planned two other robberies to rebut contention of lack of intent in driving getaway car).

[71] DiBiagio, *supra* note 45, at 1241. The court stated that "[i]t provides contextual or background information to the jury and, thus, places the charged offense in a natural or continuous sequence of events." *Id.*

intertwined" with the facts of the charged offense.[72] Allowing intrinsic other-crimes evidence continues to provide the prosecution with a fair opportunity to meet its burden while providing a more reasonable limit on the admission of other-crimes evidence.[73]

The bases for these exceptions are still subject to a Rule 403 analysis and a limiting instruction. Even though admission of prior-crimes evidence still remains prejudicial, evidence falling under these exceptions provides more probative value that may outweigh the prejudice.

V. CONCLUSION

Mississippi's current application of Rule 404(b) violates the character prohibition inherent in the rule. Evidence admitted to show intent to sell infers character and propensity to sell and is highly prejudicial to defendants. Absent some exception, this prior-crimes evidence should not make it past a Rule 403 analysis.

Mississippi courts should abandon their current approach and establish guidelines that would provide for a more equitable application of the law. A proper standard would require a higher showing by the prosecution for admittance of the prior-sales evidence. As the law currently stands, evidence of prior sales alone is not sufficient to prove intent.[74] If additional probative evidence is present, its introduction should, by itself, be sufficient to show the intent of the accused.[75] The court, by allowing this other evidence in, allows the prosecution to meet its burden and relieves the defendant of any prejudice the jury might have toward him if they had learned of his prior crimes via the prior-acts evidence. If the prosecution insists on the admittance of the prior-crimes evidence, it should show (through the exceptions to the rule or by other means) that there is a substantial need for this evidence.[76] If the prosecution cannot show the necessity of the prior-crimes evidence, the evidence should not come in. By adhering to this standard, the court will ensure that the procedural safeguards inherent in Rule 404 are maintained.

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[72] *Id. See* United States v. Cancelliere, 69 F.3d 1116, 1124 (11th Cir. 1995) (stating evidence of criminal activity other than the offense charged is not extrinsic evidence if it is inextricably intertwined with the evidence of the charged offense).

Courts have characterized other crimes evidence as intrinsic if it:

> (1) arises out of the same criminal episode or series of transactions as the charged offense;
> (2) is necessary for the jury to understand the context of the crime or completes the story of the charged offense;
> (3) identifies who committed the crime or why the charged offense was committed; or
> (4) explains the nature of the relationship between the individuals who committed the crime or explains why an individual may have knowledge of the charged offense.

DiBiagio, *supra* note 45, at 1241-42.

[73] *Id.* at 1244.

If the prosecution meets his burden, the court should pay particular attention to the weight they give to each side when conducting the Rule 403 balancing test. Because of the reprehensibility of selling drugs and the public's hatred of drug dealers the prejudicial effect towards the defendant will be great.[77] By realizing this, the court should ensure that the probative value of the evidence at issue bears enough weight to tip the scales in its favor if it is to be admitted.

Finally, the court should realize the ineffectiveness of a limited instruction to today's jury.[78] A limiting instruction should not be considered in a Rule 403 analysis as a means to reduce prejudice, nor should it be a crutch for the prosecution to lean on when the argument is made to the court for admission of the evidence.

Mississippi courts have taken the proper first step by not allowing prior sales, without other evidence, to show an accused's intent. By not allowing character evidence to come in under intent, the courts can ensure equity in the courtroom and integrity in our judicial system.

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[74] *See supra* notes 26, 54 and accompanying text.

[75] *See supra* notes 33, 34 and accompanying text.

[76] *See supra* note 34 and accompanying text.

[77] *See supra* notes 10, 39 and accompanying text.

[78] *See supra* notes 59-63 and accompanying text.

Michael B. Hewes

WHAT IN THE WIDE, WIDE WORLD OF TORTS IS GOING ON? FIRST TOBACCO, NOW GUNS: AN EXAMINATION OF *HAMILTON V. ACCU-TEK* AND THE CITIES' LAWSUITS AGAINST THE GUN INDUSTRY

I. INTRODUCTION

In the wake of the recent tobacco industry settlement,[1] a new trend is emerging in the field of tort law. Individual plaintiffs as well as cities across America are, in increasing numbers, filing suit against gun manufacturers. The February 11, 1999 jury verdict in the Eastern District of New York, *Hamilton v. Accu-tek*, which found fifteen gun manufacturers negligent in their manner of marketing and distributing handguns,[2] has at least temporarily bolstered the validity of this recent wave of anti-gun litigation.[3] Gun supporters are responding by lobbying state legislatures to regulate these types of lawsuits and have already claimed one victory in the 1999 session of the Georgia General Assembly.[4] On the federal level, Congress is currently considering two competing pieces of legislation relating to the recent shots fired at the firearms industry.[5] This comment discusses the recent verdict in *Hamilton*, the different cities' pending actions, and the varying theories of tort law under which these and previous lawsuits have been brought. It will also analyze the validity of these

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[1] The national tobacco litigation settlement of $368.5 billion stipulates that the tobacco industry will pay this amount over a period of twenty-five years. Panel Discussion, *The Tobacco Settlement: Practical Implications and the Future of the Tort Law*, 67 MISS. L.J. 847, 852 (1998). Much of this money will be used to curb teenage smoking in the United States through a "counter-marketing campaign" and to fund a national program to enable people of all ages to quit smoking. *Id.* at 852.

[2] *Handguns: Jury in Brooklyn Gun Case Finds Manufacturers Negligent in Distribution*, BNA Product Liability Daily News, Feb. 17, 1999, *available in* Westlaw, 2/17/1999 PLD d2.

[3] The New York jury verdict may have already had an effect on litigation pending in California. On September 29, 1999, a California appeals court in *Merrill v. Navegar, Inc.*, overturned a summary judgment that had been entered in favor of the defendant, Navegar, the maker of the TEC-DC9 semiautomatic weapon used in a shooting by a gunman who killed eight people in a law firm in California. *Firearms: California Court Says Gun Maker Has Duty to Shooting Victims; Sends Questions to Jury*, BNA Product Liability Daily News, Oct. 1, 1999, *available in* Westlaw, 10/1/1999 PLD d2. The court stated that the plaintiffs, who alleged that Navegar negligently manufactured and distributed the semiautomatic assault weapons, "[were] entitled to a jury determination on liability." *Id.* The court reasoned that Navegar had "'a duty to exercise reasonable care not to create risks above and beyond those inherent in the presence of firearms in our society and that there are triable issues of fact as to whether it breached

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that duty.'" *Id.* The court emphasized that no special relationship must be present between the plaintiffs and Navegar to find liability. *Id.* In reaching its decision, the court relied on evidence the plaintiffs presented, which indicated that Navegar's TEC-DC9s have been frequently used in gang shootings and other criminal acts and that Navegar was aware of these facts. *Id.* The evidence also revealed that Navegar "'deliberately targeted the marketing of the TEC-9 and TEC-DC9 to certain types of persons attracted to or associated with violence." *Id.*

[4] *Guns: Georgia Law Prohibiting Gun Suits By Cities Signed By Governor After Atlanta Files Action*, BNA Product Liability Daily News, Feb. 11, 1999, *available in* Westlaw, 2/11/1999 PLD d4. The National Rifle Association (NRA) and other gun backers supported the recent enactment of Georgia HB 189, which was sponsored by Representative Curtis Jenkins (D). *Id.* HB 189, signed into law by Governor Roy Barnes on February 9, 1999, prohibits "cities and counties in Georgia from filing product liability suits against firearms and ammunition manufacturers." *Id.* The question remains, however, whether this legislation will have any effect on the suit filed by Atlanta against fourteen gun manufacturers on February 4, 1999 (Atlanta v. Smith & Wesson Corp., Ga. State Ct., Fulton Cnty., No. 99VS0149217J, 2/4/99). *Id.* Atlanta Mayor Bill Campbell argues that the city is "confident that a court will rule that the bill is unconstitutional." *Id.*

[5] Helen Dewar and Sharon Walsh, *Fight Over Gun Suits Escalates on Hill*, WASHINGTON POST, Mar. 3, 1999, at A5. Senator Robert G. Toricelli (D – N.J.) and Representative Patrick J. Kennedy (D – R.I.) have introduced a bill that "would give the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (BATF) broad authority over all safety-related aspects of firearms commerce, including setting safety standards, issu[ing] warnings and recalling defective products." *Id.* In contrast, Representative Bob Barr (R – Ga.), a board member of the NRA, has proposed legislation that would regulate lawsuits against gun makers. *Id.* The proposed legislation, known as the "Firearms Heritage Protection Act of 1999," would prohibit lawsuits against gun manufacturers "based on criminal or unlawful use of firearms by others, as well as halt existing lawsuits already in progress." Vito Maggiolo, *Rep. Barr Aims to Ban Lawsuits Against Gun Makers* (visited on March 10, 1999) <http://www.cnn.com/ALLPOLITICS/stories/1999/03/09/guns.barr/>. Senator Barbara Boxer (D-Cal.), however, has already announced she has plans to introduce legislation that would afford cities the right to file suit against gun manufacturers. *Id.*

lawsuits under current tort law.

II. THE HISTORY OF *HAMILTON V. ACCU-TEK*

In January 1995, Freddie Hamilton (Hamilton) and Katina Johnstone (Johnstone) filed suit against forty-nine firearm manufacturers, alleging seven causes of action in the original complaint.[6] Specifically, the plaintiffs alleged (1) the manufactured handguns were "unreasonably dangerous" since the guns contained no anti-theft device, (2) the defendants should be held strictly liable for their marketing techniques under an ultrahazardous activity theory, (3) the defendants made misrepresentations to handgun purchasers and government officials, resulting in less restrictive regulation of the gun market, and (4) the defendants should be held collectively liable for marketing the handguns in a negligent manner.[7] Upon review of the defendant gun manufacturers' joint motion for summary judgment, the court granted the motion with respect to the product liability and fraud claims, but permitted the plaintiffs to proceed with the negligent marketing claim.[8]

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[6] Hamilton v. Accu-tek, 935 F. Supp. 1307, 1314-15 (E.D.N.Y. 1996). Hamilton's son was shot and killed in 1993, and although the police never recovered the gun, bullet casings found at the crime scene indicate that the gun was most likely a Beretta or a Taurus nine-millimeter handgun. *Hamilton*, 935 F. Supp. at 1314. Johnstone's husband was also shot and killed, but the police were able to recover the weapon, which was a stolen Smith & Wesson revolver. *Id.* at 1314. Plaintiffs' first four causes of action stated that the defendant gun manufacturers and distributors negligently market handguns, thus enabling "the growth of a substantial underground market in handguns." *Id.* The next two causes of action were brought under the theories of design defect and ultrahazardous activity, while the last cause of action alleged that the defendants defrauded federal officials to curtail strict oversight of the gun industry. *Id.* at 1314-15. The court granted the plaintiffs leave to amend the complaint to bring in another twenty-eight plaintiffs with similar claims. *Id.* at 1315. For instance, Gail Fox, Maria Santana, Veronica Trott, Andrea Slade-Lewis, and Koichi Sunada, each brought suit on behalf of their respective sons' estates. Hamilton v. Accu-tek, No. CV-95-0049(JBW), 1999 WL 557261, *1, *2-*3 (E.D.N.Y. June 3, 1999).

[7] *Hamilton*, 935 F. Supp. at 1324, 1329. The court stated that "[t]he heart of the plaintiffs' theory, apparently, [was] the claim that defendants' negligence in methods of marketing handguns and flooding the handgun market has fostered the development of an extensive underground economy in handguns." *Id.* at 1330.

[8] *Id.* at 1315. The court allowed the plaintiffs to proceed, but limited discov-

Regarding the design defect claim, the court stated the plaintiffs failed to prove that an anti-theft safety mechanism was even available and did not assert that they could show at trial that such a mechanism would satisfy the New York risk-utility analysis.[9] The court further stated that while marketing is conduct, it is not "activity" within the meaning of the ultrahazardous activity doctrine.[10] Rejecting the plaintiffs' fraud claim, the court opined that the plaintiffs did not claim that the defendants deceived the plaintiffs themselves; rather, the plaintiffs claimed only that the defendants defrauded government officials and handgun purchasers in general.[11]

After the plaintiffs completed the limited discovery the court had granted, the defendants filed new motions for summary judgment.[12] In an Amended Memorandum and Order, the court confined the majority of its discussion of the motion

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ery to "mechanisms in place within the handgun industry for concerted activity on matters of mutual interest." *Id.*

[9] *Id.* at 1324. The court opined that under New York tort law, a plaintiff bringing a design defect action against a gun manufacturer must claim "that a particular model in question is unreasonably dangerous." *Id.* at 1323. Looking to the Restatement of Torts, the court noted that the appropriate test is the availability of a reasonable alternative design and not society's preference for the product (anti-theft device). *Id.* The court also reasoned that hazard is an inherent risk of handguns since their purpose is to wound and to kill. *Id.*

[10] *Id.* at 1324. In its analysis, the court turned to section 520 of the Restatement (Second) of Torts to lay out the factors for determining whether an activity is abnormally dangerous as follows:

> (1) a high degree of risk of harm to others, (2) the likelihood that the harm will be great, (3) the inability to eliminate the risk through the exercise of reasonable care, (4) the extent to which the activity is uncommon, (5) the inappropriateness of the activity to the place where it is carried out, and (6) the extent of the activity's value to the community.

Id. at 1323. In granting summary judgment in favor of the defendants on this claim, the court reasoned that strict liability for ultrahazardous activity generally relates to "non-natural" uses of land. *Id.* at 1323-24.

[11] *Id.* at 1325. The court noted that under New York law, the elements of fraud consist of representation, scienter, deception, falsity, and injury. *Id.* at 1324. The court reasoned that the plaintiffs did not show that the defendants' alleged deception was "'calculated and intended' to influence the plaintiffs." *Id.*

[12] *Id.* at 1315. The defendants argued that neither discoverable nor elicited evidence could support the plaintiffs' collective liability theory relating to negligent marketing practices. *Id.*

to whether the defendants could be held collectively liable on the negligence claims under New York law.[13] The court declined to grant the defendants' motion, stating that the plaintiffs have only had an opportunity to conduct discovery on the issue of collective liability, not on the negligent marketing claim[14]: "Until discovery on that point is completed, it is difficult to determine what activity or nonactivity plaintiffs will identify as negligent."[15] The court reasoned that in light of the facts and statistics surrounding handgun violence, the plaintiffs might be able to prove that a substantial cause of the shootings involved is the existence of an underground market.[16] The court further stated that the plaintiffs had developed some facts that suggested the existence of a general understanding within the industry concerning the necessary marketing precautions to reduce the dangers of handgun sales.[17] The court concluded its discussion by stating "it

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[13] *Id.* at 1325-1331. The court noted that New York has recognized or adopted the alternative, enterprise, concerted action, and market share theories of collective liability. *Id.* at 1327. The court then thoroughly discussed the varying applications and facets of these different theories. *Id.* at 1327-29. The court, however, recognized several requirements that are consistent with all theories of collective liability, which require (1) the impracticability to show which particular defendant caused the plaintiff's injury, (2) all defendants to have committed tortious acts that could have caused the injury, (3) a relationship between the conduct or product itself and the problem of proof, and (4) an absence of another effective remedy for compensation. *Id.* at 1329.

[14] *Id.* at 1330.

[15] *Id.*

[16] *Id.* The court considered statistics that the plaintiffs offered, such as "the number of violent attacks involving firearms increased 55% between 1987 and 1992" and "gun-related homicides by juvenile offenders more than doubled between 1984 and 1992." *Id.* at 1313. The plaintiffs argued that the availability of handguns to criminals and minors despite strict state and federal laws indicates the defendants negligently market handguns. *Id.* at 1314.

[17] *Id.* at 1316, 1330. One particular fact upon which the court relied is that most of the defendants are members of a professional trade association, Sporting Arms and Ammunition Manufacturers' Institute (SAMMI), which has adopted a pledge "'to sell [their] products to only legitimate retail firearms dealers.'" *Id.* at 1315-16. The court noted, however, that the pledge does not require the manufacturers to ensure that distributors comply with the pledge as well. *Id.* at 1316.

One factor that weighed heavily in the plaintiffs' favor was the deposition of Robert I. Hass, the former Smith & Wesson Senior Vice President of Marketing and Sales. *Is He the Smoking Gun?*, Newsweek International. Jan. 25, 1999, would be premature to conclude that the New York Court of Appeals would decline to adopt any theory of collective liability in this case."[18] On December 18, 1998, the court issued an order, again denying the defendant manufacturers' motions for summary judgment.[19]

The plaintiffs had thus successfully traversed the first

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available in Westlaw, 1/25/99 NEWKINTL 42. Hass stated that oftentimes gun traffickers will illegally purchase guns from less than legitimate dealers in states with lenient gun laws and then ship the guns to states and cities with much stricter gun regulations. *Id.* The plaintiffs asserted that approximately ninety percent of the handgun related crimes in New York City were committed with handguns shipped illegally from other states. *Id.* In his deposition, Hass contended that gun manufacturers such as Smith & Wesson have the ability to keep track of where criminals get their guns and to do something to prevent this from occurring. *Id.* Hass further stated that "[t]he company and the industry are also aware that the black market in firearms is not simply the result of stolen guns but is due to the seepage of guns into the illicit market from multiple thousands of unsupervised federal firearms licensees." David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMP. L. REV. 1, 7 (1998).

[18] *Hamilton*, 935 F. Supp. at 1331. Dennis Henigan, Director of the Legal Action Project for the Center to Prevent Handgun Violence, however, noted the novelty of the plaintiffs' negligent marketing theory in stating "[t]his is the first case that I'm aware of where someone had tried to hold the [gun] industry collectively liable." *New York Federal Judge Allows Lawsuit Against Firearms Manufacturers for Negligent Marketing*, West's Legal News, May 10, 1996, *available in* Westlaw, 5-10-96 WLN 4181.

[19] Hamilton v. Accu-tek, No. 95CIV0049, 1998 WL 903473, at *1 (E.D.N.Y. Dec. 18, 1998). The order noted that a Memorandum would follow as time permitted, but the author of this comment has been unable to verify the existence of such a memorandum. *Id.* In an Order and Memorandum dated December 10, 1998, however, the court did grant several of the defendant's motions to dismiss for lack of jurisdiction. *See* Hamilton v. Accu-tek, 32 F. Supp. 2d 47 (E.D.N.Y. 1998). Judge Weinstein also "dismissed claims against 15 gun wholesalers, acting on a motion by plaintiffs' attorneys to drop them from the suit." *Handguns: Jury in Brooklyn Gun Case Finds Manufacturers Negligent in Distribution*, BNA Product Liability Daily News, Feb. 17, 1999, *available in* Westlaw, 2/17/1999 PLD d2.

In an Amended Memorandum and Order entered on June 3, 1999, the court denied defendants' motion to dismiss on the ground of collateral estoppel and defendants' Rule 50(b) motion for judgment as a matter of law. Hamilton v. Accu-tek, No. CV-95-0049 (JBW), 1999 WL 557261, *1, *5-*6 (E.D.N.Y. June 3, 1999). The court, however, granted plaintiffs' Rule 15(b) motion to amend their Second Amended Complaint "to conform to the proof at trial concerning defendants' liability under a national market share theory." *Hamilton*, 1999 WL 557261, at *9-*12. The court reasoned that the issue of market share liability had been contested thoroughly during trial and that no prejudice existed as to the position of the defendants. *Id.* at *11-*12.

major obstacle in their novel negligent marketing claim against gun manufacturers by avoiding a dismissal on summary judgment. The ensuing jury verdict in *Hamilton* awakened the firearms industry as well as legal scholars and practitioners to a new and potentially valid negligence theory relating to gun manufacturer liability.

The *Hamilton* verdict found fifteen of the remaining defendant gun manufacturers negligent in their marketing of handguns.[20] Of these fifteen manufacturers, however, the jury found only nine manufacturers liable for three of the seven shootings at issue in the case.[21] The jury verdict awarded $3.95 million to only one plaintiff: a shooting victim who survived with a bullet in his brain that has caused severe permanent disability.[22] Since this federal jury verdict will

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[20] *Handguns: Jury in Brooklyn Gun Case Finds Manufacturers Negligent in Distribution*, BNA Product Liability Daily News, Feb. 17, 1999, *available in* Westlaw, 2/17/1999 PLD d2. The fifteen gun manufacturers found to be negligent are as follows: American Arms Inc., Arcadia Machine & Tool Inc., Beretta U.S.A. Corp., Bryco Arms, Calico Light Weapons Systems Inc., Colt's Manufacturing Co. Inc., Freedom Arms Co., Glock Inc., International Armament Corp. d/b/a Interarms Industries Inc., Jennings Firearms Inc., K.B.I. Inc., Phoenix Arms Inc., Sigarms Inc., Sundance Industries Inc., and Taurus International Manufacturing Co. *Id.* None of these defendant companies were found liable for the injuries resulting to plaintiffs Andrea Slade-Lewis, Maria Santana, Freddie Hamilton or Diane Zartesky. *Hamilton*, 1999 WL 557261, at *4.

[21] *Handguns: Jury in Brooklyn Case Finds Manufacturers Negligent in Distribution*, BNA Product Liability Daily News, Feb. 17, 1999, *available in* Westlaw, 2/17/1999 PLD d2. The nine companies the jury found to be liable include: American Arms, Arcadia, Beretta, Bryco, Colt's, Glock, Phoenix, Sigarms, and Taurus. *Id.* With regard to plaintiffs Veronica Trott, Koichi Sunada, and Gail Fox, the jury found proximate causation and apportioned the damages as follows: Veronica Trott – American Arms (.23%); Arcadia (.85%); Beretta (6.03%); Bryco (5.29%); Colt's (4.14%); Glock (4.29%); Phoenix (1.3%); Sigarms (0%); Taurus (6.8%); Koichi Sunada – American Arms (.23%); Arcadia (.85%); Colt's (4.14%); Taurus (6.8%); and Gail Fox – American Arms (.23%); Beretta (6.03%); ad Taurus (6.8%). *Hamilton*, 1999 WL 557261, at *4.

[22] *Handguns: Jury in Brooklyn Case Finds Gun Manufacturers Negligent in Distribution*, BNA Product Liability Daily News, Feb. 17, 1999, *available in* Westlaw, 2/17/1999 PLD d2. The jury awarded Stephen Fox $2 million for past pain and suffering and $1.95 million for future pain and suffering and $50,000 to Fox's mother, a co-plaintiff, for nursing services rendered. *Id.*

In a Memorandum, Order and Judgment dated February 16, 1999, the court entered a default judgment against Cobray Firearms, Inc. Hamilton v. Accu-tek, likely be appealed,[23] this comment will analyze the issues that will likely be raised on appeal in Section V of this comment.

Although the jury verdict in *Hamilton* did not forge the gateway for the lawsuits brought by cities against gun manufacturers, it does reflect the dawn of a potentially devastating new era of gun manufacturers' liability. The next section of this comment outlines the different theories of tort law the cities have advanced in the pending lawsuits.

III. THE CITIES' LAWSUITS

A. *New Orleans Fires the First Shot*

The city of New Orleans became the first city to file suit against firearm manufacturers.[24] Headed by Mayor Marc H. Morial, the suit alleges that fifteen gun manufacturers, five pawnshops, and three firearms trade associations should be held liable for the cost of handgun violence in New Orleans.[25]

No. CIV950049, 1999 WL 169523, at *1 (E.D.N.Y. Feb. 16, 1999), *superseded by* Hamilton v. Cobray Firearms, Inc., No. CV 95-49 (JRW), 1999 WL 169523, at *1 (E.D.N.Y. Feb. 17, 1999). The court awarded ten thousand dollars ($10,000) to Veronica Trott, as plaintiff on behalf of the estate of Leroy Sabb, for the conscious pain and suffering damages of Sabb, from the time of the shooting to the time of death. *Hamilton*, 1999 WL 97933, at *1. The damages entered against Cobray were based on its 100% market share for the model of handgun used in the shooting of Sabb. *Id.* at *1. Cobray's market share for the type of handgun used in the shooting of Robert Robles was also found to be 100%. Accordingly, the court awarded thirty-nine thousand three hundred and four dollars ($39,304) in damages for Maria Sanatan, as plaintiff on behalf of the estate of Robles. *Id.* These damages included loss of income and services, funeral expenses, and conscious pain and suffering of Robles. *Id.*

[23] In an Amended Memorandum and Order entered on June 3, 1999, the court stated that it "respectfully recommended that the panel for the court of appeals reviewing this decision certify state law issues to the New York Court of Appeals, whose interpretations, under Erie, control." *Hamilton*, 1999 WL 557261, at *45.

[24] *New Orleans Sues Manufacturers For Handgun Violence*, Andrews Consumer Product Litigation Reporter, Dec. 1998, *available in* Westlaw, 9 No. 9 ANCPLR 3. The suit was filed in the Louisiana Civil District Court for Orleans Parish on October 30, 1998. *Id.*

[25] *Id.* The gun manufacturers named as defendants in the New Orleans suit are as follows: Arms Technology Inc., Beretta U.S.A. Corp., Bryco Arms Inc.,

The city seeks to recover the costs of "police protection, emergency services, police pensions, medical care and lost tax revenue related to handgun violence."[26] New Orleans bases its complaint upon theories of design defect, failure to warn, conspiracy and collusion, and negligence on the part of the defendant gun dealers.[27] Specifically, the suit alleges that the defendant manufacturers' guns are "unreasonably dangerous" in design due to a lack of safety devices that prevent the unauthorized use of guns.[28] The city also contends that the defen-

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Colt's Manufacturing Co., Davis Industries Inc., FMJ Inc., Glock Inc., Jennings Firearms Inc., Lorcin Engineering Co., Navegar Inc., Phoenix Arms, Sigarms Inc., Smith & Wesson Corp., Sturm, Ruger & Co., and Taurus International Manufacturing Inc. *Gun Violence: Chicago, New Orleans Sue to Recover Costs of Gun Violence from Makers, Distributors,* BNA Product Liability Daily News, *available in* Westlaw, 11/24/1998 PLD d6, and *New Orleans Sues Manufacturers for Handgun Violence,* Andrews Consumer Product Litigation Reporter, Dec. 1998, *available in* Westlaw, 9 No. 9 ANCPLR 3.

The following retailers are also named as defendants: Albert's Jewelry & Loan Pawn, Cash America Pawn of New Orleans, Majic Money Pawn Shop, New Orleans Pawn Shop, and Professional Sports Shop Inc. *Id.*

The trade associations named as defendants are as follows: American Shooting Sports Council Inc., National Shooting Sports Foundation Inc., and Sporting Arms and Ammunition Manufacturers Institute Inc. *Id.*

[26] *New Orleans Sues Manufacturers for Handgun Violence,* Andrews Consumer Product Litigation Reporter, Dec. 1998, *available in* Westlaw, 9 No. 9 ANCPLR 3. Examples of statistics to which supporters of this lawsuit have cited reveal that "it costs more than $14,000 to treat each child wounded by gunfire [and] [t]he average cost of a gun-related crime can be as high as $268,000." *Following in Tobacco's Footstep: Three Cities Take Aim at Gun Manufacturers,* Product Liability Law and Strategy, Dec. 1998, *available in* Westlaw, 17 No. 6 Prod. Liab. L. & Strategy 6.

[27] *Gun Violence: Chicago, New Orleans Sue to Recover Costs of Gun Violence from Makers, Distributors,* BNA Product Liability Daily News, Nov. 24, 1998, *available in* Westlaw, 11/24/1998 PLD d6.

[28] *Id.* The city argues that a safer alternative design, such as certain safety devices that permit only the authorized person to use the gun, are available to the gun manufacturers. *Id.* An example of such technology that has been suggested by experts and scholars is radio frequency tags. Mark D. Polston & Douglas S. Weil, *Unsafe By Design: Using Tort Actions To Reduce Firearm-Related Injuries,* 8 STAN. L. & POL'Y REV. 13, 17 (1997). Proponents of this technology argue that a gun can be designed to fire "only if the user is wearing a tag emitting a radio frequency recognized by a tag implanted in the firearm." *Id.* They further contend that such technology is both available and inexpensive since it is currently being used in automated tollbooths and shoplifter detection systems. *Id.* Other types of advanced technology that have been proposed include: Trigger-locking devices,

dants should have warned purchasers of certain risks of handguns, such as the possibility of children obtaining the gun and the fact that a round may still be in the chamber after the magazine has been removed.[29]

The New Orleans lawsuit, which is being handled by a team of sixteen plaintiffs' law firms, some of whom are members of the notorious Castano group,[30] paved the way for the city of Chicago to take aim at the firearms industry.

B. Chicago Follows Suit

Less than two weeks after the city of New Orleans filed suit, Chicago filed a $4.33 million suit against twenty-two gun manufacturers, twelve stores, and four distributors.[31] The

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magnetic encoding, touch memory, and fingerprint reading. Stephen P. Teret *et al.*, *Issues in Science and Technology: Making Guns Safer* (visited Mar. 7, 1999) <http://www.utdallas.edu/research/issues/Teret.html>. The personalization method of choice for the future is argued to be the fingerprint reading device, in which the "gun would be programmed to recognize one or more fingerprints by means of a tiny reader." *Id.* This technology would eliminate the need for the authorized gun user to wear a ring or a bracelet as required in the other personalization devices. *Id.*

[29] *Gun Violence: Chicago, New Orleans Sue to Recover Costs of Gun Violence from Makers, Distributors*, BNA Product Liability Daily News, Nov. 24, 1998, *available in* Westlaw, 11/24/1998 PLD d6. The city cites to statistics that show that "in 23 percent of the annual 1,400-1,500 unintentional shooting deaths the user is unaware that a round remains in the chamber . . . ." *Id.* The suit also argues that the defendants should have warned handgun purchasers of the need for proper storage when the guns are not in use. *Id.*

[30] *Gun Cases Use Tobacco Know-How: New Orleans, Chicago Lead The Charge. Is Alcohol Next*, The National Law Journal, Dec. 7, 1998, *available in* Westlaw, 12/7/98 NLJ A1, (col. 1). Wendell H. Gauthier, who was involved in the recent tobacco litigation and is a chairman of the Castano Plaintiffs Committee, is heading the New Orleans suit. *Id.* The Castano group consists of approximately sixty plaintiffs' firms in the United States that took part in the litigation against the tobacco industry. *Id.* The Castano group "takes its name from a 1994 class action filed in New Orleans on behalf of nicotine-addicted smokers." *Id.* Not any law firm can join, however, as exemplified in the tobacco litigation, where each member had to donate $100,000 up front to help finance the cost of the litigation. *Id.*

[31] *Following in Tobacco's Footstep: Three Cities Take Aim at Gun Manufacturers*, Product Liability Law and Strategy, Dec. 1998, *available in* Westlaw, 17 No. 6 Prod. Liab. L. & Strategy 6. The city of Chicago and Cook County filed suit in the Illinois Circuit Court, Cook County on November 12, 1998 against

city filed the lawsuit subsequent to a three-month-long police investigation known as "Operation Gunsmoke," during which police agents purchased 171 handguns from firearms dealers in Chicago's suburbs.[32] As a result of this investigation, Chicago's complaint charges that "firearms dealers in Chicago's suburbs [are] inundating the city with illegal guns – with the knowledge of nationwide manufacturers and distributors."[33]

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many of the same gun manufacturers named as defendants in the New Orleans case, including the following: Carl Walther GmbH, Hi Point Firearms, H & R 1871 Inc., International Armament Corp., Kel-Tec CNC Industries Inc., Raven Arms Inc., Sundance Inc., and the parent corporations for Beretta, Glock and Taurus. *Gun Violence: Chicago, New Orleans Sue to Recover Costs of Gun Violence from Makers, Distributors*, BNA Product Liability Daily News, Nov. 24, 1998, *available in* Westlaw, 11/24/1998 PLD d6.

The other named defendants are as follows: Ashland Shooting Supplies Inc., Faber Brothers Inc., Riley's Inc., B&H Sports Ltd., Bob's Sports Headquarters Inc., Breit & Johnson Sporting Goods Inc., Chicago Ridge Gun Shop, Chucks Gun Shop & Pistol Range, Gun World Inc., Midwest Sporting Goods, Sportsman's Center/Illinois Gun Works Ltd., Shore Galleries Inc., Sports Authority Inc., Suburban Sporting Goods, and Universal Firearms Ltd. *Id.*

On April 13, 1999, however, Chicago settled with Bob's Sports Headquarters. *Firearms: Chicago Settles With Gun Dealer; Defendant Agrees to Testify for City*, BNA Product Liability Daily News, Apr. 28, 1999, *available in* Westlaw, 4/28/1999 PLD d3. Under the agreement, Bob's Sports Headquarters agreed to "either cease operations or adhere to a set of responsible firearms sales practices." *Id.* Specifically, the settlement states that Bob's Sports Headquarters must

> decline to sell firearms to Chicago residents if the firearms are not legal in Chicago; decline to sell firearms to Chicago residents unless they are able to present evidence of their compliance with all applicable registration requirements under city gun control ordinances; report to the Chicago Police Department each sale of more than one firearm to a single individual within a 30-day period; and exercise reasonable care to avoid selling firearms that might be possessed or used illegally in Chicago.

Id. The settlement also mandates that Bob's Sport's Headquarters testify at trial on behalf of Chicago. *Id.*

[32] *Following in Tobacco's Footstep: Three Cities Take Aim at Gun Manufacturers*, Product Liability Law and Strategy, Dec. 1998, *available in* Westlaw, 17 No. 6 Prod. Liab. L. & Strategy 6. The police agents went to dealers in Chicago's suburbs because they believed that these dealers were a primary source of the city's illegal gun market. *Id.* In some instances, the undercover police officers were able to purchase handguns from these dealers without the required state gun permit and "even when the [police agents] boasted they would use the guns to commit criminal acts within Chicago." *Id.*

[33] *Id.* The complaint further charges that "[d]espite some of the strictest gun

Unlike New Orleans, however, Chicago rests its claim on the theory that the defendants have caused a "public nuisance" by imposing additional financial burdens on the city's police and fire departments and the public hospital.[34] Specifically, the city's complaint alleges "that the manufacturers and distributors 'knowingly oversupply or saturate the market with their products in areas where gun control laws are less restrictive, knowing that persons will illegally bring them into the jurisdictions where they are illegal.'"[35] The city also argues that many of the firearms the defendants manufacture are designed specifically for street fighting and not for self-protection or valid recreational purposes.[36] Chicago's lawsuit also differs from the New Orleans suit in that no large team of plaintiffs' firms are handling the matter; rather, Chicago's Corporation Counsel and a state attorney are representing Chicago and Cook County, respectively.[37]

C. *Bridgeport, Connecticut, and Miami-Dade County, Florida, File Suit*

On January 27, 1999, Bridgeport, Connecticut, and Miami-Dade County, Florida, (Miami-Dade) filed separate lawsuits against the firearms industry.[38] Bridgeport brought ac-

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control laws in the country and an aggressive police policy of confiscating, seizing and destroying handguns, the city's illegal gun market continues to be saturated by new weapons." *Id.*

[34] *Id.*

[35] *Gun Violence: Chicago, New Orleans Sue to Recover Costs of Gun Violence from Makers, Distributors*, BNA Product Liability Daily News, Nov. 14, 1998, *available in* Westlaw, 11/24/1998 PLD d6. Brian L. Crowe, counsel for Chicago, argues the defendants formulate specific industry schemes to bypass city ordinances, which "prohibit the private ownership of handguns unless registered prior to March 30, 1982." *Id.*

[36] *Id.* Crowe states that the guns are lightweight, easy to conceal, and have excessive firepower and are, thus, targeted at illegal users. *Id.* One particular gun in question is Navegar's TEC-DC9, which is a compact assault weapon that can easily be converted from semi-automatic to fully automatic and is claimed to have a fingerprint resistant finish. *Id.*

[37] *Id.* Brian L. Crowe , as the city's corporation counsel, is representing Chicago, and state attorney Richard A. Devine is representing Cook County. *Id.* Temple University Professor of Law David Kairys will provide of counsel assistance. *Id.*

[38] *Firearms: Bridgeport, Miami-Dade Sue Gun Industry, Seek Damages for*

tion against approximately thirty-five manufacturers, wholesalers, retailers, and trade associations.[39] Similar to the Chicago and New Orleans lawsuits, Bridgeport based its complaint upon the theories of public nuisance, design defect, and inadequate warnings.[40] Bridgeport is suing the firearms industry to recover the millions of dollars in expenses handgun violence has imposed on the city's police protection, health care, and social services.[41] One of the main assertions of this lawsuit is that the gun industry has targeted the city because of its high minority population, which has been the primary victim of the city's reported handgun violence.[42]

Miami-Dade filed suit, bringing design defect and inadequate warning claims against twenty-six gun manufacturers and negligence claims against three trade associations.[43] Specifically, the complaint alleges that the guns that the defendants manufacture are "inherently and unreasonably danger-

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Health Care, Police Costs, BNA Product Liability Daily News, Jan. 29, 1999, *available in* Westlaw, 1/29/1999 PLD d3. Bridgeport filed suit in the Connecticut Superior Court, Fairfield Judicial District and Miami-Dade County filed suit in the Florida Circuit Court, Eleventh Judicial Circuit for Miami-Dade County. *Id.*

[39] *Id.*

[40] *Id.* The Bridgeport lawsuit alleges six causes of action, which are as follows: (1) product liability, (2) public nuisance, (3) civil conspiracy, (4) violation of the Connecticut Unfair and Deceptive Trade Practices Act, (5) unjust enrichment, and (6) negligence. *Id.*

[41] *Id.* Other goals the Bridgeport lawsuit is seeking to achieve include: "[Guaranteeing] that gun manufacturers produce the safest possible product; [forcing] the industry to take affirmative steps to prevent guns from falling into the hands of criminals; and [changing] the companies' advertising practices." *Id.*

[42] *Id.* Statistics to which the city cites include "[e]ighty percent of all homicide victims, and [ninety] percent of all homicide defendants in Bridgeport are either black or Hispanic . . . ." *Id.*

[43] *Id.* The gun manufacturers named as defendants in the Miami-Dade lawsuit are as follows: Arms Technology, Inc., Beretta U.S.A. Corp., Browning Arms Co., Bryco Arms Inc., Carl Walther GmbH, Colt's Manufacturing Co., Davis Industries Inc., FMJ, Forjas Taurus S.A., Glock Inc., Glock GmbH, H & R 1871 Inc., International Armament Corp., Kel-Tec CNC Industries Inc., Lorcin Engineering Co., MKS Supply Inc., Navegar Inc., Phoenix Arms. Pietro Beretta Sp. A., Raven Arms Inc., Sigarms Inc., Smith & Wesson Corp., Sturn, Ruger & Co., Sundance Industries Inc., and Taurus International Manufacturing Inc. *Id.*

The three trade association defendants are as follows: American Shooting Sports Council Inc., National Shooting Sports Foundation Inc., and Sporting Arms and Ammunition Manufacturers' Institute Inc. *Id.*

ous" since they do not have safety devices to prevent unauthorized persons from using the guns.[44] Miami-Dade also argues that the defendant gun manufacturers do not provide adequate warnings regarding the proper storage of the guns and further contends that the manufacturers' advertising schemes "'suggested, prompted, and encouraged unsafe storage practices.'"[45] Similar to the other cities' lawsuits Miami-Dade's suit is seeking compensatory damages for the additional financial burdens handgun violence has imposed on the city's police protection, emergency services, pension benefits, and health care.[46]

The Miami-Dade lawsuit, however, has already prompted action within the Florida State Legislature. State Representative George Albright, chairman of the House Finance and Taxation Committee, has proposed a bill in reaction to the Miami-Dade lawsuit headed by Mayor Alex Penelas.[47] The proposed bill "would not only forbid state and local officials to file such lawsuits against the firearms industry, but would also make it a felony to do so, punishable by up to five years in prison."[48] Several legal observers, however, have already raised questions of the proposed bill's constitutional validity.[49] A somewhat similar situation has arisen in the state of Georgia.

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[44] *Id.* Miami-Dade argues that manufacturers could produce handguns with safety devices that prevent unauthorized people from using the guns at a relatively inexpensive cost to the industry. *Id.* Miami-Dade also points to the statistic that "as many as 320 to 345 unintentional deaths occur in the United States each year because users are unaware that a round can remain in the chamber of a semi-automatic pistol when the magazine is removed." *Id.* Dennis Henigan, Director of the Legal Action Project of the Center for the Prevention of Handgun Violence, stated that a device can be installed on handguns that would prevent the gun from firing when the magazine has been removed for a cost of approximately 50 cents. *Id.*

[45] *Id.* To provide support for this contention, Henigan points to an old Beretta U.S.A. Inc., advertisement which pictures "a handgun and a bullet on a nightstand next to an alarm clock and pictures of small children." *Id.*

[46] *Id.* According to Miami-Dade Mayor Alex Penelas's office, "[t]he average cost of a 12-day hospital stay at Jackson Memorial for a gunshot injury was more than $21,000, excluding physicians' costs . . . ." *Id.* Miami-Dade also alleges that handgun violence has caused a loss in tax revenues because of a reduction in tourism and property values. *Id.* In addition to compensatory damages, the suit is seeking punitive damages. *Id.*

[47] *Capital Focus: Gun Bill Reflects Anger Over Attacks on Industries*, Wall Street Journal: Florida Journal, Mar. 3, 1999, *available in* Westlaw, 3/3/99 WSJ F1. Representative Albright introduced the bill in late February in an effort to curb the use of litigation to cause reform within the firearms industry. *Id.*

D. The Conflict Between Atlanta and HB 189

On February 4, 1999, Atlanta became the fifth city in the United States to sue the gun industry when it filed suit against fourteen gun manufacturers and three trade associations.[50] The Atlanta lawsuit brings design defect and inadequate warning claims as well as claims of negligence and collusion.[51] The Atlanta complaint argues that the defendant manufacturers' guns are "unreasonably dangerous" because of their lack of safety devices that are allegedly available.[52] The suit also asserts that gun manufacturers provide inadequate warnings and instructions and that semi-automatic handguns do not have a warning feature indicating whether a round of ammunition is still in the chamber when the magazine has been removed.[53] Atlanta further claims that the defendant "trade associations 'acted in concert with, tacitly agreed with, colluded, cooperated with and aided and abetted the Defendant Manufacturers' with failing to install safety devices and issue adequate warnings."[54] As with the pioneering cities' lawsuits, the Atlanta suit is seeking recovery of the costs that handgun violence has inflicted on the city's police and emergency services.[55]

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[48] *Id.* Albright's proposed bill is a direct response to the Miami-Dade lawsuit, as Albright stated, "I wanted it specifically to send a message to the Miami Mayor." *Id.* Miami-Dade Mayor Penelas has stated that he would halt the pending lawsuit if gun manufacturers simply agreed to install certain safety devices. *Id.* Mayor Penelas, however, also stated that "[t]he reason [the city is] resorting to lawsuits is that the state capitols don't have the political courage to take on the [gun] industry." *Id.*

[49] *Id.* Miles A. McGrane III, a member of the Florida Bar's committee on access to courts, stated that the bill would most likely be deemed violative of the Florida Constitution's guarantee of access to the courts. *Id.*

[50] *Gun Liability: Atlanta Joins Ranks of Cities to Sue Gunmakers for Liability*, BNA Product Liability Daily News, Feb. 8, 1999, *available in* Westlaw, 2/8/1999 PLD d3. The Atlanta lawsuit, filed in the Georgia State Court for Fulton County, named the following gun manufacturers as defendants: Arms Technology Inc., Beretta U.S.A., B.L. Jennings Inc., Bryco Arms, Colt's Manufacturing Co., Davis Industries, Full Metal Jacket Inc., Glock, Navegar Inc., Phoenix Arms, Sigarms Inc., Smith & Wesson Corp., Strum, Ruger & Company Inc., and Taurus International Marketing Inc. *Id.*

The three trade associations named as defendants are as follows: The American Shooting Sports Council Inc., The National Shooting Sports Foundation Inc., and the Sporting Arms and Ammunition Manufacturers Institute Inc. *Id.*

[51] *Id.* Atlanta Mayor Bill Campbell stated, "Many of these companies consistently and recklessly manufactured firearms that are negligently designed under Georgia law." *Id.* Mayor Campbell asserted that the primary goal of the lawsuit is to protect children and claimed that if the gun manufacturers agreed to install safety devices on their products, he would consider putting an end to the suit. *Id.*

[52] *Id.* The complaint contends that the installation of trigger locks could help prevent the use of handguns by unauthorized persons. *Id.* The complaint also states that the installation of a safety device to keep the gun from firing when

Five days after Atlanta filed its lawsuit, however, Georgia Governor Roy Barnes signed HB 189 into law, which prohibits cities and localities within the state from bringing product liability actions against the firearms and ammunition industries.[56] Whether this new piece of legislation will have any effect on the pending lawsuit filed by Atlanta remains to be seen. The scenarios in Florida and Georgia, however, could create a race within states across the United States between cities interested in suing the gun industry and state legislators interested in stifling such lawsuits.[57]

E. Cities Considering Suing the Gun Industry

In light of the foregoing city lawsuits, a growing number of cities are reported to be seriously considering filing suit against the firearms industry. These cities include Philadel-

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the magazine has been removed would curtail the number of unintentional shootings each year, specifically those involving teenage males. *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* Similar to the Miami-Dade lawsuit, Atlanta is seeking punitive damages. *Id.*

[56] *Guns: Georgia Law Prohibiting Gun Suits by Cities Signed by Governor after Atlanta Files Action*, BNA Product Liability Daily News, Feb. 11, 1999 *available in* Westlaw, 2/11/1999 PLD d4. *See also supra* note 3 and accompanying text.

[57] Proposals similar to the newly enacted Georgia legislation are expected in Alabama, Kansas, Louisiana, Michigan, Minnesota, Texas, Vermont, and Wyoming. E.J. Dionne, Jr., *Tough on Guns*, WASH. POST, Mar. 2, 1999, at A17.

phia, San Francisco, Los Angeles, St. Louis, Seattle, St. Paul, and Minneapolis.[58] If the number of lawsuits filed by cities against the gun industry continue to increase, however, the gun industry as a whole may be forced into bankruptcy since it does not have as deep a pocket as the tobacco industry.[59]

IV. THEORIES ADVANCED IN PAST LAWSUITS INVOLVING GUN MANUFACTURERS

A. *Strict Liability*

Traditionally, plaintiffs suing gun manufacturers have relied on two theories of strict liability: the risk-utility test and the "abnormally dangerous activity" doctrine.[60]

1. The Risk-Utility Test

When a product has been manufactured as intended, as is the case with most gun manufacturer liability suits, the risk-utility test offers a method of determining the defectiveness of that product.[61] The risk-utility test requires the court to balance the risk, that is "the probability and severity of the harm posed by the product design," against the social utility of the product design.[62] Utility is predominantly analyzed in terms of the existence of an alternative feasible design.[63] Under the risk-utility approach, strict liability will apply if the risks of the product outweigh the product's social utility.[64]

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[58] *See* Kevin Duchschere, *Minneapolis, St. Paul Officials Consider Joining in Lawsuits Against Gunmakers*, Star-Tribune Newspaper of the Twin Cities, Mar. 2, 1999, *available in* Westlaw, 3/2/99 STTRMSP 02B; *Gun Cases Use Tobacco Know-How: New Orleans, Chicago Lead the Charge. Is Alcohol Next?*, The National Law Journal, Dec. 7, 1998, *available in* Westlaw, 12/7/98 NLJ A1, (col. 1); Max Schulz, *Smoking Guns: A Big City Mayor Trains His Sights on Weapon Makers*, Reason Online (visited Mar. 2, 1999) <http://www.reason.com/9807/col.schulz.html>; *Seattle Gun Lawsuit Is Bound to Misfire*, Seattle Times, Dec. 28, 1998 (visited Mar. 8, 1999) <http://www.seattletimes.com/news/editorial/html98/suited_122898.html>.

[59] *Jumping the Gun? Attacks on Firearms Echo Earlier Assaults on Tobacco Industry*, WALL ST. J., Mar. 12, 1999, *available in* Westlaw, 3/12/99 WSJ A1. The tobacco industry records annual sales of $45 billion, whereas the gun industry records annual sales of approximately $1 billion. *Id.*

[60] *See* Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability Is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777, 779 (1995); *see also* Joi Gardner Pearson, Comment, *Make It, Market It, and You May Have To Pay for It: An Evaluation of Gun Manufacturer Liability for the Criminal Use of Uniquely Dangerous Firearms in Light of In Re 101 California Street*, 1997 BYU L. REV. 131, 138 (1997).

[61] McClurg, *supra* note 60, at 779.

Courts, however, have historically declined to impose strict liability on gun manufacturers under the risk-utility test.[65] In *Caveny v. Raven Arms Co.*,[66] for example, the court addressed the issue of whether the risk-utility theory applied to determine the defectiveness of a .25 caliber handgun used in the murder of the plaintiff's decedent where the handgun functioned properly.[67] The plaintiffs argued that the handgun, commonly known as a "Saturday Night Special," embodied risks that extensively outweighed its utility since its only possible legitimate purpose was for self-protection.[68] The court held that the risk-utility theory applies only when the product has not functioned correctly and not when it has functioned as intended.[69] The court reasoned that by virtue of the fact a third party fired the handgun with the bullet striking the decedent, the handgun functioned as intended.[70] The risk-utility test "is only proper when the product could be made safer through an alternative design and not when the product is by its nature dangerous."[71]

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[62] *Id.* at 780.

[63] *Id.* For an alternative feasible design to be present, the alleged "alternative" must (1) be safer than the design in question, (2) be technologically feasible, (3) be economically feasible, (4) not hinder the intended utility of the product, and (5) not cause risks of equal or greater weight than the risk in question. *Id.*

[64] Pearson, *supra* note 60, at 142.

[65] *Id.* (stating that the "[risk-utility] standard traditionally applies only when a product malfunctions.").

[66] 665 F. Supp. 530 (S.D. Ohio 1987).

[67] *Caveny*, 665 F. Supp. at 531-32. The plaintiffs, the administrator of the estate and the surviving daughter of the female decedent, sought to impose strict liability on Raven Arms, the manufacturer of the handgun in question. *Id.* at 531.

[68] *Id.* at 532. The plaintiffs further contended the handgun could not serve valid purposes, such as for "military use, law enforcement, hunting and target shooting." *Id.* The plaintiffs also maintained they had evidence to show that the "handgun virtually is useless for self-defense." *Id.*

[69] *Id.* In granting the defendant's motion to dismiss, the court further stated that the manufacture or marketing of a handgun is not an "abnormally dangerous activity" and declined to follow the limited category of strict liability for manufacturers of Saturday Night Specials created by the Maryland Court of Appeals and relied upon by the plaintiffs. *Id.* at 532-35.

[70] *Id.* at 533

2. *Special Liability for "Saturday Night Specials"?*

In *Kelley v. R.G. Industries, Inc.*,[72] the only reported decision to impose strict liability on a gun manufacturer, the court created a special breed of strict liability for manufacturers of Saturday Night Specials.[73] The plaintiff, who was shot during a robbery of the grocery store at which he worked, filed a tort action against the manufacturer and marketer of the Saturday Night Special used in the shooting.[74] The court rejected the application of the "abnormally dangerous activity" doctrine and the risk-utility test.[75] The court, however, stated that common law principles are not static and that the fact the defendant gun manufacturer would not be held strictly liable under recognized principles of tort law is not dispositive.[76] Basing its decision on public policy considerations, the *Kelley* court held that manufacturers of Saturday Night Specials could be held strictly liable "to innocent persons who suffer gunshot injuries from the criminal use of their products."[77] The Maryland Legislature, however, effectively superseded the *Kelley* decision by enacting legislation that prohibits the imposition of strict liability upon gun manufacturers.[78]

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[71] *Id.*

[72] 497 A.2d 1143 (Md. 1985).

[73] *Kelley*, 497 A.2d at 1159. In its analysis, the court reasoned that the policy considerations embodied in the gun control laws enacted by both the United States Congress and the Maryland General Assembly support the proposition that Saturday Night Specials have little, if any, use in society. *Id.* at 1154-59.

[74] *Id.* at 1145. The plaintiff sought to impose strict liability, arguing that the handgun was "abnormally dangerous" and that the handgun was "unreasonably dangerous" because it was defective in its marketing and design. *Id.* The plaintiffs also brought a claim under a negligence theory. *Id.*

[75] *Id.* at 1147-49. The court stated that the "abnormally dangerous activity" doctrine did not apply to the manufacturing or marketing of handguns because the risks in the use of a handgun have no relation to the occupation or ownership of land. *Id.* at 1147. The court further opined that the risk-utility analysis applies only in situations in which "something goes wrong with [the] product." *Id.* at 1149. The court noted that the handgun in the case *sub judice* performed precisely as intended. *Id.*

[76] *Id.* at 1150. The court asserted that "the common law adapts to fit the needs of society." *Id.* at 1159. The *Kelley* court, however, warned that common law principles should not be altered when such a change would be contrary to the public policy advanced by the Maryland General Assembly. *Id.* at 1151. The court then went on to discuss the legislative policies of both the United States Congress and the Maryland General Assembly. *Id.* at 1154-59.

3. *The Restatement (Third) of Torts*

It is unclear what impact, if any, the recent adoption by the American Law Institute of section 2(b) of the Restatement (Third) of Torts will have on the risk-utility analysis in the context of gun manufacturer liability, especially if states do not also adopt this edition of the Restatement. Some scholars argue that section 2(b) effectively prevents courts from holding that handguns are defective.[79] The argument is that the language of section 2(b), which states "[a product] is defective when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . .," requires a plaintiff to prove the existence of an alternative design.[80] The comments to section

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[77] *Id.* at 1159. The court emphasized that the liability imposed was a distinct and limited area of strict liability. *Id.* The court stated that once the trier of fact determines the handgun is a Saturday Night Special, liability can be imposed against the manufacturer if the following elements are met: The plaintiff or plaintiff's decedent is injured or killed from being shot with a Saturday Night Special, the shooting is a criminal act, and the plaintiff did not play a part in the criminal activity. *Id.* at 1160.

At least one scholar has argued that although the court stated the holding rested on public policy, the court actually engaged in a risk-utility analysis by emphasizing that Saturday Night Specials are highly prone to use in criminal activity and serve no other legitimate purpose to society. *See* McClurg, *supra* note 60, at 784; *Kelley*, 497 A.2d at 1158.

[78] *See* MD. CODE ANN., CRIMES & PUNISHMENTS § 36-I(h)(1) (Supp. 1998); *see also* Delahanty v. Hinckley, 564 A.2d 758, 761-62 (D.C. 1989) (declining to adopt limited area of strict liability created by *Kelley* because doctrine would allow recovery only for those persons shot with cheap guns).

[79] McClurg, *supra* note 60, at 786.

[80] *Id.* at 785-86 (discussing effect of language of section of proposed draft containing substantively same language as final draft of Restatement (Third) of Torts on application of risk-utility analysis in context of gun manufacturer liability).

2(b), however, provide a plaintiff circumstances in which a reasonable alternative does not need to be shown directly for strict liability purposes.[81] These circumstances, where "common experience teaches that an inference of defect may be warranted under the specific facts" and the product is "so manifestly unreasonable," will doubtfully offer any inroads for plaintiffs since courts have continually rejected to apply the risk-utility test in this context.[82] More often than not, a handgun performs its "manifestly intended function" and although dangerous, it is not "manifestly unreasonable" in design.

4. *The "Abnormally Dangerous Activity" Doctrine*

A second theory of strict liability, "abnormally dangerous activity," has also proven to be of little assistance in plaintiffs' efforts to impose strict liability upon gun manufacturers. Section 519 of the Restatement (Second) of Torts stipulates "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."[83] Section 520 of the Restatement (Second) of Torts outlines the following six factors to be considered when determining whether an activity is "abnormally dangerous": (1) existence of high risk of harm, (2) probability that the resulting harm will be great, (3) inability of using reasonable care to eliminate the risk, (4) extent to which the activity is not a matter of common usage, (5) inappropriateness of the activity in terms of location, and (6) extent to which the risks outweigh the value of the activity to the community.[84] Applying these two sections along with common law principles, courts have consistently held that the manufacturing of handguns does not constitute an "abnormally dangerous activity."[85] The most common reasons enunciated by the courts to refuse application of the "abnormally dangerous activity" doctrine to the manufacturing of handguns include: The doctrine is grounded in "abnormally dangerous activity" carried out on land,[86] the doctrine encompasses activity that is dangerous in and of itself,[87] and the manufacturing of handguns is a matter of common usage.[88] Further reasoning can be found in comment d of section 519 of the Restatement (Second) of Torts, which states "liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity."[89] Since the courts have traditionally rejected to impose strict liability upon gun manufacturers under the risk-utility test or the "abnormally dangerous activity" doctrine, this comment will next examine the courts' analyses of negligence claims in this context.

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[81] *See* RESTATEMENT (THIRD) OF TORTS § 2 cmts. b, e (1997). Comment b states that proof of a reasonable alternative design is not always necessary in cases of design defects. *Id.* cmt. b. Comment b further states that "[s]ection 3 provides that when circumstantial evidence supports the conclusion that a defect was a contributing cause of the harm and that the defect existed at the time of sale, it is unnecessary to identify the specific nature of the defect and meet the requisites of § 2." *Id.*

Comment e adds that in some instances the design of a product is "so manifestly unreasonable" that liability should apply even with no showing of a reasonable alternative design. *Id.* cmt. e.

[82] *Id.* cmts. b, e. One of the circumstances to which comment b specifically refers is where the product fails to function as intended. *Id.* cmt. b. However, courts have recognized that when handguns are used as a means to kill or wound a human, the handguns are functioning as intended. *See* McClurg, *supra* note 60, at 781-82.

[83] RESTATEMENT (SECOND) OF TORTS § 519(1) (1976).

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[84] RESTATEMENT (SECOND) OF TORTS § 520(a)-(f) (1976).

[85] *See* Copier v. Smith & Wesson Corp., 138 F.3d 833, 839-40 (10th Cir. 1998) (applying Utah law); Shipman v. Jennings Firearms, Inc., 791 F.2d 1532, 1533-34 (11th Cir. 1986) (applying Florida law); Caveny v. Raven Arms Co., 665 F. Supp. 530, 531-32 (S.D. Ohio 1987) (applying Ohio law); Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 774-75 (D.N.M. 1987) (applying New Mexico law).

[86] *See Shipman*, 791 F.2d at 1533. The court, in holding that the manufacture and sale of handguns is not an "abnormally dangerous activity," stressed that the doctrine as laid down in sections 519 and 520 of the Restatement (Second) of Torts "imposes strict liability on those whose [abnormally dangerous] use of their land injures neighboring landowners. *Id.* at 1533. The *Shipman* court also cited to the landmark case of *Rylands v. Fletcher* as authority for its analysis. *Id.*; *see generally* Rylands v. Fletcher, L.R. 3 H.L. 330 (1868).

[87] *See* Hammond v. Colt Indus. Operating Corp., 565 A.2d 558, 563 (N.J. Super. Ct. Law Div. 1989). Relying on section 519, comment d and section 520 of the Restatement (Second) of Torts, the court held that the manufacturing and marketing of handguns is not an "abnormally dangerous activity" and subsequently granted the defendant's motion to dismiss on that claim. *Hammond*, 565 A.2d at 563. The court reasoned that "[t]he marketing of a gun is not dangerous *in and of itself* since when injury occurs it is not the result of the sale itself, but the result of actions taken by a third party." *Id.* (emphasis added).

[88] *See Armijo*, 656 F. Supp. at 774-75. In its analysis, the court stated that an activity could not be deemed an "abnormally dangerous activity" if it was a matter of common usage. *Id.* at 774; *see also* RESTATEMENT (SECOND) OF TORTS § 520(d) (1976) (stating extent to which activity is not matter of common usage is factor to consider in determining whether activity is abnormally dangerous). The court concluded that the manufacturing and distribution of guns is common within the meaning of "common usage" and stated that to hold that the manufactur-

B. Negligence

1. The Problem of "Duty"

The first hurdle for plaintiffs in a negligence claim is establishing the element of duty. In other words, the plaintiff must show that the defendant owed the plaintiff a legal duty to act with reasonable care. The main problem with duty, however, is its elusive definitiveness: "[T]he problem of duty is as broad as the whole law of negligence, and . . . no universal test for it has ever been formulated."[90] The most accepted test for determining whether a legal duty exists is the foreseeable plaintiff standard enunciated in the landmark case, *Palsgraf v. Long Island Railroad Co.*[91] Other factors, however, are relevant in the determination of the existence of a legal duty, such as the morality and justice of imposing liability and society's ideology of where to direct the loss.[92] The argument

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ing of handguns is an "abnormally dangerous activity" would "require that manufacturers of guns, knives, drugs, alcohol, tobacco and other dangerous products act as insurers against all damages produced by their products." *Armijo*, 656 F. Supp. at 775 (quoting Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984)).

[89] RESTATEMENT (SECOND) OF TORTS § 519 cmt. d (1976).

[90] McClurg, *supra* note 60, at 796 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 356 (5th ed. 1984)).

[91] McClurg, *supra* note 60, at 796 n.88. *Palsgraf* stated that the existence of a legal duty turns on the relation between the plaintiff and the defendant, which emerges from the foreseeability of harm to the plaintiff. *Id.* (citing Palsgraf v. Long Island R.R. Co., 165 N.E. 99, 101 (N.Y. 1928)). It is, however, important to note that duty is a question of law. McClurg, *supra* note 60, at 796.

[92] *Id.* at 797 (citing Soldano v. O'Daniels, 190 Cal. Rptr. 310, 315 (Cal. Ct. App. 1983); William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15

has been made that the manufacturing and marketing of handguns meets the foreseeability standard since handguns are marketed at such high volumes to the general population that "any member of the public is a foreseeable plaintiff."[93] Despite this argument courts have often declined to hold a legal duty exists in the context of gun manufacturer liability.

In *Delahanty v. Hinckley*,[94] the court addressed a certified question of whether, in the District of Columbia, manufacturers and distributors of Saturday Night Specials can be held strictly liable for injuries resulting from criminal use of these guns.[95] The plaintiff, a policeman who was shot by Hinckley in an attempted assassination of President Reagan, advanced several claims of liability against the handgun manufacturer, including negligence.[96] In analyzing the negligence claim, the court held that due to a lack of a "special relationship" between the gun manufacturer and the plaintiff the gun manufacturer would not be held liable for the harm resulting from the criminal act of the third party.[97] The court stated that relationships that have been held to establish a duty of protection include: Landlord to tenant, employer to employee, and hospital to patient.[98] Subsequent cases involving negligence

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(1953)).

[93] McClurg, *supra* note 60, at 797. McClurg further argues that the harmful consequences of handguns are foreseeable due to the statistics related to handgun violence. *Id.* at 797.

[94] 564 A.2d 758 (D.C. 1989).

[95] *Delahanty*, 564 A.2d at 759. The District Court for the District of Columbia had granted the defendants' motion to dismiss, and on appeal, the United States Court of Appeals for the District of Columbia Circuit certified the question of liability to the District of Columbia Court of Appeals. *Id.* The court of appeals certified the question due to the recent adoption of the limited area of strict liability for manufacturers of Saturday Night Specials by the Maryland Court of Appeals in *Kelley v. R.G. Industries. See* Delahanty v. Hinckley, 845 F.2d 1069, 1071 (D.C. Cir. 1988); *see also supra* notes 72-77 and accompanying text.

[96] *Delahanty*, 564 A.2d at 759. The plaintiffs also brought claims of strict liability under the "abnormally dangerous activity" doctrine and the new, limited cause of action adopted by the *Kelley* court. *Id.*

[97] *Id.* at 762. The court reasoned that the plaintiffs alleged no "special relationship" and did not allege a reasonable way in which gun manufacturers could prevent criminal use of their handguns by screening purchasers. *Id.*

[98] *Id.* (citing Kline v. Massachusetts Ave. Apartment Corp., 439 F.2d 477, 482-

claims against handgun manufacturers have followed the "special relationship" requirement asserted in the *Delahanty* decision,[99] and some cases have emphasized that a gun manufacturer has no duty to warn of the dangers of criminal use of handguns[100] or to warn sellers of the dangers of selling handguns.[101]

2. *Superseding Causes*

Another obstacle for plaintiffs in gun manufacturer liability cases is the element of causation. Even if a court found that gun manufacturers owe a legal duty to plaintiffs, gun manufacturers could still argue no liability under the theory of superseding causes since most of these types of cases involve a plaintiff being injured by the criminal use of handguns. Section 440 of the Restatement (Second) of Torts defines superseding cause as "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."[102] Some scholars, however, contend that although section 448 of the Restatement (Second) of Torts explicitly states that a criminal act of a third party is a superseding cause, a gun manufacturer could still be held liable if the manufacturer knew or should have known that a

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83 (D.C. Cir. 1970)). The court opined that it would not extend the reasoning embodied in the decisions in which "special relationships" were found to the context of gun manufacturers. *Id.*

[99] *See* Casillas v. Auto-Ordinance Corp., No. C 95-3601 FMS, 1996 WL 276830, at *3 (N.D. Cal. May 17, 1996); First Commercial Trust Co. v. Lorcin Eng'g, Inc., 900 S.W.2d 202, 204-05 (Ark. 1995).

[100] *See First Commercial Trust Co.*, 900 S.W.2d at 205 (stating that gun manufacturers do not have duty to warn of danger of criminal use of gun when danger or potential of danger is obvious, and concluding that dangers of firearms are obvious); *see also* Armijo v. Ex Cam, Inc., 656 F. Supp. 771, 775 (D.N.M. 1987) (declining to impose duty on gun manufacturer not to sell handguns "merely because such products have the potential to be misused for purposes of criminal activity").

[101] *See* Diggles v. Horwitz, 765 S.W.2d 839, 841-42 (Tex. App. 1989) (stating gun manufacturer has no duty to warn sellers of dangers of selling handguns when hazards are obvious or actually known).

[102] RESTATEMENT (SECOND) OF TORTS § 440 (1964).

situation affording the third party an opportunity to commit the criminal act might be created by the negligent conduct of the manufacturer.[103] In making this argument, one scholar relies upon an analogy posed in *Richman v. Charter Arms Corp.*, which states "if car manufacturers must reasonably expect purchasers of their products to speed periodically, then surely handgun manufacturers must reasonably expect purchasers of their products to kill periodically."[104] This is a tenuous analogy since it is arguable that car manufacturers can reasonably expect purchasers of their products to speed from time to time. Arguably, everyone has sped at least one time in his or her lifetime. On the other hand, it is unreasonable for a gun manufacturer to expect persons who make legal purchases of their products to kill periodically. The discrepancy in the gravity of speeding and killing completely obviates the effect and reasoning of this analogy.

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[103] Pearson, *supra* note 60, at 156-57. Section 448 of the Restatement (Second) of Torts states:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

RESTATEMENT (SECOND) OF TORTS § 448 (1964). Comment c of section 448 further states that "[i]t is enough that the actor should have realized the likelihood that his crime would create a temptation which would be likely to lead to [the commission of a crime]." *Id.* cmt. c.

In *Hamilton*, Judge Weinstein stressed that under New York law, an intervening act will break the chain of causation "'if it is of such an extraordinary nature or so attenuated from the defendants' conduct that responsibility for the injury should not reasonably be attributed to them.'" Hamilton v. Accu-tek, No. Cv-95-0049 (JBW), 1999 WL 557621, *30 (E.D.N.Y. June 3, 1999) (quoting Gordon v. Eastern Ry. Supply, Inc., 626 N.E.2d 912, 916 (N.Y. 1993)). Judge Weinstein stressed that the defendants were negligent since they did not take reasonable steps to prevent the criminal misuse of their handguns, which was a reasonably foreseeable result of their negligent marketing practices. *Hamilton*, 1999 WL 557621, at *32.

[104] Pearson, *supra* note 60, at 158 (citing Richman v. Charter Arms Corp., 571 F. Supp. 192, 197 (E.D. La. 1983)). The *Richman* court posed this analogy after reviewing a Fifth Circuit case, which stated, "It would be blinking reality in this case to hold that Ford could not reasonably have expected purchasers of any automobile . . . to transgress our nation's speeding laws periodically." *Richman*, 571 F. Supp. at 196-97 (citing LeBouef v. Goodyear Tire & Rubber Co., 623 F.2d 985, 989 n.4 (5th Cir. 1980)).

3. *Negligent Marketing*

The claim of negligent marketing against handgun manufacturers is one that has only recently surfaced. As discussed previously, ample case law exists regarding the claim that marketing handguns is an "abnormally dangerous activity," which courts have consistently rejected. Case law concerning claims that gun manufacturers have *negligently* marketed their products, however, is sparse. In light of this fact, a review of several variations of negligent marketing claims advanced by one scholar and the few cases relevant to this issue is appropriate.

The first proposed theory is that a gun manufacturer is negligent if it markets a firearm which it knows, or should know, presents a high risk of being used for criminal purposes and has little utility for legitimate purposes.[105] Under this theory, the issue would be "whether the manufacturer created an unreasonable risk of harm by manufacturing and marketing the weapon," not whether the gun was defective.[106] The proponent of this theory, however, rationally states that this theory will unlikely be successful since it requires a negligence risk-utility analysis that is similar to the risk-utility analysis in strict liability claims, which courts have rebuffed.[107]

The second and third proposed theories focus on the manufacturer's manner of marketing. The second theory asserts that manufacturers owe a duty not to market guns in a manner likely to increase the risk of harm substantially.[108] Based on this approach, a gun manufacturer would breach this duty if the manufacturer used a marketing scheme that "deliberately, recklessly, or negligently targeted criminal consumers."[109] The third, related theory proposes that gun manufacturers have an affirmative duty to use reasonable care to limit the dangers of their products being sold to persons likely to misuse them.[110] The premise of these two theories is that the law of negligence requires persons to exercise reasonable care to avoid foreseeable risks of harm to others, such as criminal acts.[111] This scholar stresses, however, that proving a gun manufacturer implemented a willful marketing plan directed at criminals may be difficult.[112]

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[105] McClurg, *supra* note 60, at 800. McClurg argues that this theory would be appropriate in cases involving manufacturers of assault weapons and Saturday Night Specials. *Id.*

[106] *Id.* McClurg emphasizes that with a negligence claim, the focus is on the manufacturer's conduct, whereas with a strict liability claim, the focus is on the condition of the handgun. *Id.*

[107] *Id.* at 801. McClurg writes that "[o]ne of the primary criticisms of risk-utility analysis grounded in strict liability has been that, as applied in most jurisdictions, it is identical to the risk-utility analysis used to assess the reasonableness of risks under negligence law." *Id.* at 800.

One case upon which this scholar relies to support these two theories is *Moning v. Alfono*,[113] which involved the issue of whether marketing slingshots *directly to children* creates an unreasonable risk of harm.[114] In *Moning*, the court held that the defendant manufacturer, by marketing the slingshot, owed a legal duty to those affected by its use and that the question of whether the defendant breached that duty was a question for the jury.[115] The court in *Caveny v. Raven Arms Co.*, however, distinguished the facts of the *Moning* decision from the context of gun manufacturers.[116] In *Caveny*, the court examined the plaintiffs' claim that the defendant gun manufacturer's manner of distribution was defective.[117] The court declined to apply the *Moning* decision because the facts in that case were easily distinguishable from the case at hand.[118] The court stated that the *Moning* court recognized that special rules apply to children in tort law since they are more inclined to act without regard to risks.[119] In declining to apply *Moning* to the context of gun manufacturers, the court stated:

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[108] *Id.* at 806.

[109] *Id.*

[110] *Id.*

[111] *Id.* McClurg stresses that courts have held gun retailers liable for failure to use reasonable care when selling guns in scenarios that present foreseeable risks of criminal activity. Relying on these decisions, McClurg argues that gun manufacturers should have the same obligation in implementing their marketing plans. *Id.* at 806-07.

[112] *Id.* at 810 (recognizing that many trial courts have dismissed gun manufacturer litigation at pleading stage, thus preventing plaintiffs from having full opportunity to engage in discovery).

[113] 254 N.W.2d 759 (Mich. 1977).

[114] McClurg, *supra* note 60, at 807; *see Moning*, 254 N.W.2d at 769-70.

[115] *Moning*, 254 N.W.2d at 762-63.

[116] Caveny v. Raven Arms Co., 665 F. Supp. 530, 533 (S.D. Ohio 1987).

> Since children are readily identifiable, methods of distribution can be designed to prevent the sale of inherently dangerous items to children. In contrast, it is more difficult to conceive of a method of distribution by which handgun manufacturers could avoid the sale of its product to all potential misusers.[120]

One of the few cases to directly address the issue of negligent marketing is *Bubalo v. Navegar, Inc.*[121] In *Bubalo*, a third party shot two police officers with a TEC-DC9, manufactured by the defendant, when they arrived at the scene of a breaking and entering.[122] In addressing the plaintiffs' claims that the defendant gun manufacturer engaged in negligent marketing and negligent distribution, the court stressed that these two claims are distinct and have different elements under Illinois law.[123] Negligent distribution applies when the manufacturer fails to exercise reasonable care to avoid the sale of its products to those likely to present harm to society.[124] Negligent marketing applies when the manufacturer uses certain methods and arrangements of packaging to induce those who will foreseeably use the product dangerously to purchase the product.[125] Dismissing the plaintiffs' claim of negligent distribution, the court stated that a manufacturer of a non-defective firearm does not have a duty to oversee the distribution of the product to the public at large past the point of a legal sale.[126] Turning to the negligent marketing claim, the court emphasized that the plaintiffs had to prove that the method of marketing used by the defendant was "a factor" in the third party's choice to purchase the gun.[127] In dismissing this claim, the court stated the plaintiffs failed to show this "requisite causal relation" since they did not show that the defendant's marketing plan was "a factor" in the third party's use of the TEC-DC9.[128] A subsequent decision in *Bubalo* concerning the defendant's motion for reconsideration offers insight into the claim of public nuisance against gun manufacturers.

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[117] *Caveny*, 665 F. Supp. at 533. To support this claim, the plaintiffs relied upon the *Moning* decision. *Id.* at 533.

[118] *Id.*

[119] *Id.*; *see Moning*, 254 N.W.2d at 768 (stating that under tort law, special rules for children have been applied, such as in doctrines of attractive nuisance and negligent entrustment).

[120] *Caveny*, 665 F. Supp. at 533 (citation omitted).

[121] No. 96 C 3664, 1997 WL 337218 (N.D. Ill. June 13, 1997); *see also* McCarthy v. Olin Corp., 119 F.3d 148, 156-57 (2d Cir. 1997) (rejecting plaintiff's negligent marketing claim by stating that under New York law, manufacturer has no duty to control conduct of third persons to prevent from causing harm to others); Leslie v. United States, 986 F. Supp. 900, 911 (D.N.J. 1997) (dismissing plaintiff's claim that manufacturer negligently marketed hollow point bullets because absent special relationship, manufacturer owed no duty to prevent criminal misuse of product); Resteiner v. Sturm, Ruger & Co., 566 N.W.2d 53, 56 (Mich. Ct. App. 1997) (granting gun manufacturer's motion for summary disposition in connection with plaintiffs' claim that manufacturer was negligent for marketing its revolver to general public).

[122] *Bubalo*, 1997 WL 337218, at *1.

4. *Public Nuisance*

As with the claim of negligent marketing, the amount of case law related to the claim of public nuisance against handgun manufacturers is limited. In *Bubalo*, the court originally denied the defendant gun manufacturer's motion to dismiss the plaintiffs' claim of public nuisance.[129] The court reasoned that the plaintiffs had shown that the gun manufacturer had "created the advertisements that caused the alleged nuisance."[130] The court stressed that under Illinois law, liability for a claim of public nuisance does not require the plaintiffs to prove the gun manufacturer had *control* of the nuisance that allegedly caused the plaintiffs' injuries.[131]

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[123] *Id.* at *6.

[124] *Id.*

[125] *Id.*

[126] *Id.* at *5. The court further stated that once a manufacturer distributes a non-defective firearm to a federally licensed seller, the manufacturer's liability ends for negligent distribution purposes. *Id.*

[127] *Id.* at *8.

[128] *Id.* at *8-9.

[129] *Id.* at *5. The plaintiffs had claimed that the gun manufacturer, Navegar,

On the defendant's motion for reconsideration, however, the court dismissed the plaintiffs' claim for public nuisance.[132] In its analysis of the law of public nuisance, the court stated that according to section 821 of the Restatement (Second) of Torts, a public nuisance is "an unreasonable interference with a right common to the general public."[133] Again, citing to section 821, the court noted that the interference with the public right must be "unreasonable."[134] The court, however, recognized that its prior ruling contained an error since the court asserted that a Seventh Circuit case "expressly" upheld "the viability of a nuisance claim against the manufacturer of a non-defective product for injuries arising from the use of the product subsequent to the point of sale."[135] The *Bubalo* court not-

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"unreasonably and substantially interfered with the common rights of the general public," thus affecting the health and safety of the public. *Id.* at *2.

[130] *Id.* at *5. Navegar had advertised that its TEC-DC9 has a special finish that purportedly increases the velocity of bullets and serves as a resistance to fingerprints. *Id.* at 2. The court stated that under Illinois law, a public nuisance is "'[a]n act or failure to act which injures the safety, health or morals of the public; or which causes substantial public annoyance, inconvenience or injury'." *Id.* at *3. The court further stated that to plead a cause of action for public nuisance a plaintiff must allege that the defendant "*created* or continued the alleged nuisance." *Id.* (emphasis added). The court also noted that the right "'to be free from disturbance and reasonable apprehension of danger to person and property'" is a public right for purposes of a claim for public nuisance. *Id.* at *4.

[131] *Id.* at *5.

[132] Bubalo v. Navegar, Inc., No. 96 C 3664, 1998 WL 142359, at *5 (N.D. Ill. Mar. 20, 1998).

[133] *Bubalo*, 1998 WL 142359, at *1. The court further noted that a nuisance must affect an interest common to the general public to constitute a public nuisance. *Id.* at *1. The court also stated that Illinois courts are in agreement with the Restatement's definition of public nuisance. *Id.*

[134] *Id.* at *2. The court stressed this distinction in rejecting the defendant's argument that the court's previous ruling created unlimited liability against manufacturers of lawful, non-defective products. *Id.*

[135] *Id.* at *3-*4. In its motion for reconsideration, the defendant argued that

ed that the Seventh Circuit had actually stated that one could be held liable for a nuisance for participating in carrying on the nuisance, but that the facts of that case did not illustrate that the defendant manufacturer participated in carrying on the alleged nuisance.[136] In other words, the Seventh Circuit's holding did not "expressly" uphold the viability of a nuisance claim in this context. In dismissing the plaintiffs' claim for public nuisance, the court stated that it was "reluctant to recognize a new theory of nuisance liability under Illinois law without a more solid foundation in the state decisional law."[137] As a result, the viability of the theory of public nuisance in the context of handgun manufacturer liability appears to be left unsettled.

V. A PROSPECTIVE VIEW OF *HAMILTON V. ACCU-TEK* ON APPEAL

The defendants in *Hamilton* are expected to appeal the jury verdict to the Second Circuit.[138] One issue that the defendants may raise on appeal is that Judge Weinstein had allowed the jury to reach a compromise verdict.[139] The defendants'

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the *Bubalo* court had misinterpreted a holding by the Seventh Circuit by stating that holding "expressly" upheld the viability of such a claim. *Id.* at *3. *See generally* City of Bloomington v. Westinghouse Elec. Corp., 891 F.2d 611 (7th Cir. 1989).

[136] *Bubalo*, 1998 WL 142359, at *3-*4. The Seventh Circuit had cited to section 834 of the Restatement (Second) of Torts which states "[o]ne is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on." *Id.; see Bloomington*, 891 F.2d at 614 n.5. The *Bubalo* court suggested that if the defendant manufacturer in *Bloomington* had not taken precautions to alert its customers of the dangers of the product, "nothing in [*Bloomington*] would preclude the imposition of liability on the manufacturer under those facts." *Bubalo*, 1998 WL 142359, at *4.

[137] *Id.* at *5. The court noted that it could not find any cases from other jurisdictions that would provide guidance as to how Illinois would decide this particular issue. *Id.*

[138] *Handguns: Jury in Brooklyn Gun Case Finds Manufacturers Negligent in Distribution*, BNA Product Liability Daily News, Feb. 17, 1999, *available in* Westlaw, 2/17/1999 PLD d2.

[139] *Id.* After the trial, one of the defendants' attorneys reportedly stated that compromise verdicts are wrong. *Id.* Even one of the plaintiffs' attorneys noted

contention is that Judge Weinstein did not sufficiently advise the jury against a compromise verdict after receiving a jury note expressing the jury's division in opinion regarding the evidence and liability.[140] Due to the subject matter of this comment, however, this potential issue does not merit further elaboration at this time.

Regarding the jury's finding that the defendant gun manufactures were negligent in their manner of marketing, the defendants will likely turn to *McCarthy v. Olin Corp*,[141] a recent Second Circuit decision. In *McCarthy*, the court addressed the issue of whether the defendant ammunition manufacturer had negligently marketed its hollow point bullets known as Black Talons by offering the product to the general public.[142] The plaintiffs, two surviving victims and the estate of a deceased victim, brought claims of strict liability and negligent marketing against the manufacturer of the Black Talons used in a vicious attack on the plaintiffs.[143] The plaintiffs contended

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that since the jury did not award damages in all of the shootings, the verdict seems to reflect "'a compromise the jury reached through give and take so they could come back with a verdict and not a mistrial.'" *Id.*

[140] *Id.*

[141] 119 F.3d 148 (2d Cir. 1997).

[142] *McCarthy*, 119 F.3d at 156. Black Talons are hollow point bullets designed to spread into six sharp-edged "talons" upon impact, increasing the amount of injury by tearing through tissue and bone. *Id.* at 151. Originally, the bullet was manufactured for law enforcement personnel, but the defendant manufacturer, Olin Corp., eventually made it available to the public market. *Id.* at 152. Due to public pressure, however, Olin pulled the bullet from the shelves and once again restricted sales to law enforcement agencies. *Id.* at 152.

The United States District Court for the Southern District of New York dismissed the plaintiffs' claims for failure to state a claim upon which relief could be granted. *Id.* at 151. The plaintiffs then appealed the dismissal to the Second Circuit and asked the court to certify the question of ammunition manufacturer liability to the New York Court of Appeals. *Id.*

[143] *Id.* at 151-52. In late 1993, Colin Ferguson boarded a commuter train in New York City and opened fire on the train's passengers using a 9mm semi-automatic pistol loaded with Black Talons that Ferguson had allegedly purchased prior to Olin's retraction of the bullets from the public market. *Id.* As a result, the plaintiffs brought suit against Olin, claiming (1) the bullets were defectively designed because of their ability to increase injury on impact, (2) the bullets are "unreasonably dangerous per se," and (3) the defendant negligently marketed the bullets. *Id.* at 155-56.

Olin negligently manufactured the Black Talons by permitting these bullets, which contain severe wounding power, to be sold to the public at large.[144] The court rejected the plaintiffs' claims, stating that under New York law, a manufacturer has no duty "to control the conduct of third persons to prevent them from causing injury to others."[145] New York law does not impose a legal duty on a manufacturer to control the distribution of potentially dangerous products even if it was foreseeable to the manufacturer that criminal use of its product could occur.[146] The court emphasized that the plaintiffs had not shown the existence of any "special relationship" between the defendant and the third party who had attacked the plaintiffs.[147]

Hamilton involves a claim of negligent marketing in connection with seven different criminal shootings. The plaintiffs in *Hamilton* contend that the defendant gun manufacturers' marketing plan caused the culmination of an underground market, thus increasing the availability of handguns to criminals and minors.[148] On appeal, the Second Circuit will have to consider the applicability of its own precedent enunciated in *McCarthy* to the facts of *Hamilton*. If *McCarthy* is controlling, it is arguable that the plaintiffs in *Hamilton* should have never passed through the duty stage of its negligence claim. *McCarthy* clearly states that under New York law, manufacturers do not have a legal duty to control the distribution of their potentially dangerous products even it if is foreseeable to the manufacturer that criminal use of the product could occur.[149] Furthermore, the question of whether a "special relationship" existed between the parties could conceivably play a determinative role in the outcome of the case.[150]

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[144] *Id.* at 156. The plaintiffs argued that Olin should have restricted sales to law enforcement agencies. *Id.* The plaintiffs also contended that Olin knew or should have known that its advertising would entice criminals to purchase the Black Talons. *Id.* Olin had used advertisements that emphasized the bullets' destructive characteristics. *Id.*

[145] *Id.* at 156. The court stressed that New York courts are not eager to impose a duty of care on a defendant "where there is little expectation that the defendant could prevent the actions of a third party." *Id.*

The court also rejected the plaintiffs' claims of design defect and "unreasonably dangerous per se." *Id.* at 155-56. The court reasoned that the application of the risk-utility test was improper in this situation since the bullets were not defective. *Id.* at 155. The Black Talons were designed to kill or cause serious injury. *Id.* The court rebuffed the "unreasonably dangerous per se" argument because it involves a risk-utility analysis, which the court had denied to apply. *Id.* at 157

The *McCarthy* court further stated that certification of the questions involved in this case was not warranted because a sufficient amount of precedent existed for the court to decide the case aptly. *Id.* at 153-54.

[146] *Id.* at 157.

[147] *Id.*

[148] *See supra* note 16 and accompanying text.

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[149] *See supra* notes 145-46 and accompanying text. In an Amended Memorandum and Order, Judge Weinstein noted, however, that under New York law, "'the boundaries of duty are not simply contracted or expanded by the notion of foreseeability.'" Hamilton v. Accu-tek, No. CV-95-0049 (JBW), 1999 WL 557261, *13 (E.D.N.Y. June 3, 1999) (citing Palka v. Servicemaster Mgmnt. Servs. Corp., 634 N.E.2d 189, 193 (N.Y. 1994)). Judge Weinstein also analyzed the imposition of liability for the acts of third parties. Judge Weinstein stated that New York courts are traditionally reluctant to impose any such liability for the following two reasons: (1) the "crushing liability" on defendants that would essentially overburden their potential to provide socially useful services and (2) the unfairness of imposing a duty on a party who could have done little to prevent any harm from occurring. *Hamilton*, 1999 WL 557261, at *14. Addressing these two concerns, Judge Weinstein argued that the defendants in the case *sub judice* had "appreciable control" over the eventual use of their products due to their relationships with distributors and retailers downstream. *Id.* at *15. Furthermore, Judge Weinstein emphasized that the recognition of such a duty would not deliver a "crushing liability" on manufacturers since, under a negligence scheme, manufacturers could feasibly avoid the imposition of liability simply by distributing their products in a responsible manner. *Id.*

Judge Weinstein argued that the *McCarthy* decision is distinguishable from the case *sub judice* because *McCarthy* did not focus on the "nature of the marketing technique" of a dangerous product. *Id.* at *20. Judge Weinstein also argued that the Second Circuit in *McCarthy* was split on the New York rule. *Id.* at *45.

[150] *See supra* notes 94-98, 147 and accompanying text. Judge Weinstein declined to afford any merit to the defendants' argument that the absence of a "special relationship" would relieve them of a duty to prevent the misconduct of third parties. *Hamilton*, 1999 WL 557261, at *16. First, Judge Weinstein stressed that manufacturers have a special ability to detect and protect against certain risks that accompany their products, which places the defendants "in a protective relationship with those foreseeably and potentially put in harm's way by their products." *Id.* at *16. Second, Judge Weinstein urged that manufacturers relationships with distributors and retailers establishes a duty since the manufacturers have ample control over the ability to protect potential victims. *Id.*

Judge Weinstein also noted that New York law places broad duties on manu-

The *Caveny* decision appears to support the *McCarthy* holding. The *Caveny* court explicitly declined to apply the *Moning* decision to the context of gun manufacturer liability, emphasizing the difficulty of formulating a distribution plan through which a gun manufacturer could avoid the sale of guns to "all potential misusers."[151] Although the factual distinction of the creation of an underground market between *Hamilton* and *McCarthy* may prove to be determinative, it is reasonably arguable that on appeal, the unprecedented verdict should be negated.

VI. SUMMARY ANALYSIS OF THE CITIES' CLAIMS

The New Orleans, Miami-Dade, and Atlanta lawsuits all claim that the respective defendant handgun manufacturers' products are "unreasonably dangerous" because they do not contain certain safety devices to prevent any unauthorized use of the guns.[152] A claim that a product is "unreasonably dangerous," however, essentially requires the court to engage in a risk-utility analysis.[153] As discussed previously, courts have consistently declined to apply the risk-utility test when there is nothing wrong with the product.[154] When the handgun functions as intended, the courts will not conduct a risk-utility analysis. Even though the cities argue that economically feasi-

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facturers. *Id.* at *17 (citing Liriano v. Hobart Corp., 700 N.E.2d 303, 305 (N.Y. 1998)). Judge Weinstein contends that the imposition of a duty in direct relation to the marketing of a nondefective dangerous product "is consistent with the expansive view of manufacturers' duties dating back to MacPherson and consistently reaffirmed since then, most recently in Liriano." *Hamilton*, 1999 WL 557261, at *19. Judge Weinstein stated that in *Liriano*,

> the court held that the removal of a safety guard by the purchaser of a meat grinder did not insulate the manufacturer from liability for failure to warn because "it [was] neither infeasible nor onerous, in some cases, to warn of the dangers of foreseeable modifications that pose the risk of injury."

Id. at *19 (citing *Liriano*, 700 N.E.2d at 307).

[151] *See supra* notes 113-20 and accompanying text.

[152] *See supra* notes 29, 45, 53 and accompanying text.

[153] McCarthy v. Olin Corp., 119 F.3d 148, 156 (2d Cir. 1997).

[154] *See supra* notes 69, 75 and accompanying text.

ble technology is available for gun manufacturers to personalize handguns, "[t]here is no reason to search for an alternative safer design where the product's sole utility is to kill and maim."[155]

These same three cities as well as Bridgeport have initiated claims of inadequate warning. The cities contend that the defendant gun manufacturers provided inadequate warnings concerning (1) the proper storage of handguns,[156] (2) the possibility that a round of ammunition is still in the chamber of a semi-automatic handgun when the magazine has been removed,[157] and (3) the dangers of handguns.[158] The District of Columbia Circuit stated in *Delahanty* that a gun manufacturer has no duty to warn "when the danger, or potentiality of danger, is generally known and recognized."[159] The court further asserted that the hazards of firearms are obvious.[160] The Supreme Court of Arkansas has followed this line of reasoning in *First Commercial Trust*.[161] The cities' claims of inadequate warning all encompass situations in which the danger or potential of danger is obvious. A main issue the cities have advanced is the sobering statistic that children often shoot themselves or those nearby because they do not realize a round still remains in the chamber of a semi-automatic handgun when the magazine has been removed.[162] Although these incidents are certainly tragedies, fault cannot necessarily lie with the gun manufacturers. The owners of these handguns have likely acted negligently by not properly storing the guns to prevent those who do not appreciate the risks from obtaining the guns and who ultimately injure or kill themselves or another. Certainly the potential danger that a child might stumble upon or actively seek out a handgun in the child's home is obvious. An accepted theory of liability in these situations is that of negligent entrustment.[163] Thus, upon considering existing case law, the courts could arguably reject the cities' inadequate warning claims.

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[155] *McCarthy*, 119 F.3d at 155.

[156] *See supra* note 45 and accompanying text.

[157] *See supra* notes 29, 53 and accompanying text.

[158] *See supra* note 29 and accompanying text.

[159] Delahanty v. Hinckley, 564 A.2d 758, 760 (D.C. 1989); *see supra* notes 98-99 and accompanying text.

[160] *Delahanty*, 564 A.2d at 760.

[161] *See supra* note 100 and accompanying text.

[162] *See supra* note 29 and accompanying text.

The Chicago and Bridgeport lawsuits, however, include claims of public nuisance, which are novel in the context of handgun manufacturer liability.[164] Chicago specifically argues that the defendant gun manufacturers saturated the market in jurisdictions where gun control laws are less restrictive, knowing persons would illegally bring the guns into jurisdictions where they are illegal.[165] Bridgeport claims the gun manufacturers have targeted the city because of its dense minority population.[166] *Bubalo* states that a person can be subject to "liability for a nuisance caused by an activity, not only when [that person] carries on the activity but also when [that person] participates to a substantial extent in carrying it on."[167] The *Bubalo* decision seems to indicate that a gun manufacturer's advertisements could constitute participation "to a substantial extent."[168] The court, however, recognizing the significance of this type of claim, declined to acknowledge a "new theory of nuisance liability under Illinois law without a more solid foundation in the state decisional law."[169] This language alone could prove to be crucial to Chicago's claim. Another pivotal element of a public nuisance claim is that an interference with a public right has to be "unreasonable."[170] The definition of "unreasonable" in the context of gun manufacturer liability will likely play a key role in this pending litigation. Perhaps the only certainty surrounding these claims is that the cities' burden of proving the elements of public nuisance is quite significant.

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[163] Dennis Henigan, *Victims' Litigation Targets Gun Violence* (visited Mar. 2, 1999) <http://www.handguncontrol.org/legalaction/dockets/A3/a3vctmlg.htm>. Section 308 of the Restatement (Second) of Torts states:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

RESTATEMENT (SECOND) OF TORTS § 308 (1964). Comment b explicitly states that it is negligent to leave a loaded weapon within the reach of a child. *Id.* cmt. b.

[164] *See supra* notes 34-36, 40 and accompanying text.

[165] *See supra* notes 35-36 and accompanying text.

[166] *See supra* note 42 and accompanying text.

[167] *See supra* note 136 and accompanying text.

[168] Bubalo v. Navegar, Inc., No. 96 C 3664, 1998 WL 142359, at *5 (N.D. Ill. 1998); *see supra* note 128 and accompanying text.

[169] *Bubalo*, 1998 WL 142359, at *5.

VII. CONCLUSION

While handgun violence statistics clearly expose the nation to a perpetuating problem, the solution does not necessarily command the imposition of liability on handgun manufacturers. Where *Hamilton* and the pending cities' lawsuits lead us is unclear, but this brand of litigation unfortunately embodies an effort to hold entire industries liable for the sale of lawful, non-defective products. Second Circuit precedent and case law from other jurisdictions, however, offer much needed guidance in curtailing such liability in *Hamilton* and the cities' lawsuits. Changes in the gun industry should take place on the floors of the legislatures, not in the halls of justice, lest tort law become a vehicle for not only stomping out cigarettes and melting down guns, but also for tearing down walls of other entire industries.

Doug Morgan

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[170] *See supra* note 134 and accompanying text.

RECENT DECISIONS

EMPLOYMENT LAW—AMERICANS WITH DISABILITIES ACT—CORRECTIVE AND MITIGATING MEASURES SHALL BE CONSIDERED IN DETERMINING WHETHER INDIVIDUAL IS DISABLED UNDER ADA*

I. FACTS

In 1992, twin sisters (Karen Sutton and Kimberly Hinton) applied at United Air Lines (United) for the position of global airline pilot.[1] The sisters were severely myopic, but with the aid of contact lenses or eyeglasses, their vision was 20/20.[2] United informed them at their interviews, however, that they did not meet the minimum uncorrected vision standards of the company and that it could not hire them.[3] The sisters consequently filed suit against United in the United States District Court for the District of Colorado.[4] The sisters claimed that United discriminated against them based either on their disability of severe myopia or because United regarded them as disabled.[5]

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* Outstanding Case Note Award. Presented by the law firm of Ott and Purdy of Jackson, Mississippi.

[1] Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2143 (1999). The sisters met all of the Federal Aviation Administration requirements, and United invited them both back for interviews. *Sutton*, 119 S. Ct. at 2143.

[2] *Sutton,* 119 S. Ct. at 2143. With the use of corrective eyewear, both sisters performed everyday activities that an unimpaired individual performed. *Id.*

[3] *Id.* The vision standards of United required that an applicant have at least 20/100 uncorrected vision. The sisters' uncorrected visual acuity was roughly 20/200 in their right eyes and 20/400 in their left eyes. *Id.*

The district court dismissed the sisters' complaint for failure to state a claim upon which relief could be granted.[6] The Tenth Circuit Court of Appeals affirmed the lower court's ruling and found that the sisters were not disabled under the Americans with Disabilities Act (ADA).[7] The United States Supreme Court granted certiorari and held: affirmed.[8] The Court held that when an individual used devices to mitigate an impairment, the court must take into account the effects of the devices on that particular individual when assessing a disability discrimination claim under the ADA.[9]

II. RELATED LAW

A. *Individualized Inquiry Under the ADA*

The Supreme Court turned to the importance of an individualized inquiry under the ADA when assessing an HIV-positive dental patient in *Bragdon v. Abbott*.[10] In *Bragdon*, a woman in the asymptomatic phase of HIV filed a charge of disability discrimination under the ADA against a dentist who had a policy to refuse treatment of HIV-positive patients in his office.[11] The Court found that the ADA covered the woman's asymptomatic HIV infection as a valid disability.[12]

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[4] *Id.* The sisters had previously filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC). *Id.* They received their right to sue letter from the agency before filing suit in district court. *Id.*

[5] *Id.* at 2144. The sisters claimed that their severe myopia constituted a substantial impairment or that United regarded them as substantially impaired in their major life activity of working. *Id.* Both of these types of discrimination violated the Americans with Disabilities Act (ADA). *Id.*

[6] *Id.* The district court decided to dismiss the complaint based on the sister's ability to correct their vision. *Id.* With the aid of eyeglasses or contact lenses, the sisters' vision no longer substantially limited a major life activity and the sisters did not prove that an employer regarded them as disabled, which eliminated a claim under the ADA. *Id.*

[7] *Id.* at 2144. The Tenth Circuit Court of Appeals agreed with the district court's reasoning that the sisters were not disabled under the ADA because their corrected vision was 20/20. *Id.*

[8] *Id.* The Supreme Court cited the Tenth Circuit's ruling as conflicting with other circuit courts, including the First, Second, Third, Fifth and Seventh Circuits. *Id.*

[9] *Id.* at 2151-52.

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[10] 118 S. Ct. 2196 (1998).

[11] *Bragdon*, 118 S. Ct. at 2201. The dentist stipulated that he would only fill Ms. Abbott's cavity at a hospital, and only then if she paid the extra hospital costs. *Id.* Ms. Abbott based her claim on the Americans with Disabilities Act, 42 U.S.C. § 12182(a) (1994). *Id.* The Court looked to the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1994), to clarify the definitions of the various terms in the ADA, as the ADA's definition of disability was drawn "almost verbatim" from that previous Act. *Bragdon,* 118 S. Ct. at 2202. "Because the language of the two statutes (ADA and Rehabilitation Act) is substantially the same, we apply the same analysis to both." Doe v. Maryland Med. Sys. Corp., 50 F.3d 1261, 1264 n.9 (4th Cir. 1995) (explaining in HIV disability case that exact phrases and words were present in both statutes).

The Department of Health, Education and Welfare first interpreted the phrase "physical impairment" from the Rehabilitation Act in 1977. *Bragdon*, 118 S. Ct. at 2202. It explained the term as any physiological condition "affecting one or more of the following systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine. . . ." 45 C.F.R. § 84.3(j)(2)(i) (1998). The Equal Employment Opportunity Commission (EEOC) adopted this definition for Title I of the ADA. 29 C.F.R. § 1630.2 (h)(1) (1998). Rather than define "major life activity," the Rehabilitation Act listed examples, such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii). The EEOC has also adopted this definition to interpret the ADA. 29 C.F.R. § 1630.2(i). There was no regulatory guidance for "substantially limits" stemming from the Rehabilitation Act. *Bragdon*, 118 S. Ct. at 2205. The EEOC had issued guidelines for Title I of the ADA and defined the phrase as "(i) Unable to perform a major life activity that an average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to . . . the average person. . . ." § 1630.2(j).

[12] *Bragdon*, 118 S. Ct. at 2202. The Court applied a three-step analysis to subsection A cases under the ADA. *Id.* Under subsection A of the Americans with Disabilities Act, 42 U.S.C. § 12102 (1994), the word "disability" with respect to an individual meant "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). The Court stated first that an individual must have a "physical impairment." *Bragdon*, 118 S. Ct. at 2202. Second, the Court must identify the "major life activity" the impairment affects. *Id.* Third, the Court decides whether the impairment "substantially limits" the individual's major life activity. *Id.* Since *Bragdon*, other courts have used the three-step process to determine whether an individual

The Court explained that the inquiry into whether an individual was disabled under the ADA was a separate and distinct inquiry in each case.[13]

B. Adherence to EEOC Guidelines

In *Doane v. City of Omaha*,[14] the Eighth Circuit presented its views on assessing measures that mitigate the effects of a visual disability under the ADA.[15] The city of Omaha denied employment to a veteran police officer who had glaucoma in one eye.[16] The police officer sued the city for disability dis-

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is disabled under the ADA. Sacay v. Research Found., 44 F. Supp. 2d 496, 500 (E.D.N.Y. 1999). To evaluate a medical student's disability claim, the court used *Bragdon's* three-step process as a legal standard. *Sacay*, 44 F. Supp. 2d at 500. *See* EEOC v. R.J. Gallagher Co., No. 98-20351, slip op. at 6 (5th Cir. 1999) (rejecting lower court's use of five-part test, finding it complicated, citing Supreme Court's three-step process in *Bragdon*); Colwell v. Suffolk County Police Dept., 158 F.3d 635, 641 (2d Cir. 1998) (applying *Bragdon's* three-step process to police officer's disability claim under ADA).

[13] *Bragdon*, 118 S. Ct. at 2214 (Rehnquist, C.J., concurring in part, dissenting in part). The Chief Justice emphasized that the Court must look at an individual's particular circumstances to decide the validity of an ADA claim. *Id.* The majority also declined to rule on whether HIV was a per se disability; rather, it assessed the disease as it affected the individual in question. *Id.* at 2206-07. *See* School Bd. v. Arline, 480 U.S. 273, 287 (1987) (finding that school board did not conduct individualized inquiry into risk of particular teacher's condition; it based its decision to fire her on nature of disease alone); Cehr's v. Northeast Ohio Alzheimer's Research Ctr., 155 F.3d 775, 782 (6th Cir. 1998) (noting that nurse suffering from severe psoriasis had not received benefit of individualized inquiry on her ADA claim); Byrne v. Board of Educ., 979 F.2d 560, 564 (7th Cir. 1992) (explaining importance of individualized inquiry in ADA case involving teacher with aspergillus sensitivity).

The Court further held that any health risk the woman might pose to health care providers had to be assessed using medical or objective evidence. *Bragdon*, 118 S. Ct. at 2213. *Cf.* Alan J. Ocheltree, Note, Bragdon v. Abbott, 25 OHIO N.U. L. REV. 183, 198 (1999) (arguing that courts should require medical evidence to assess other patients' risk, not just threat to doctors).

[14] 115 F.3d 624 (8th Cir. 1997).

[15] *Doane*, 115 F.3d at 628. The Court stated that in order to perform an individualized type of inquiry into a disability, it must consider the individual's impairment in its unmitigated state. *Id.* The Court found that the EEOC Interpretive Guidelines were accurate. *Id.* The guidelines stated in part that to determine substantial limitations on an individual's major life activity, the assessment "must be made on a case by case basis, without regard to mitigating measures. . . ." 29 C.F.R. app. § 1630.2(j) (1998).

[16] *Doane*, 115 F.3d at 626. The police officer's visual acuity was 20/20 with

crimination under the ADA.[17] The court accepted the Equal Employment Opportunity Commission's (EEOC) guidelines as an accurate interpretation of the ADA and found that the police officer had a disability under the statute.[18] Though his body had adjusted to his monocular vision, the court explained that the police officer's internal, subconscious compensation for the diseased eye did not preclude the police officer from the protection afforded by the ADA.[19]

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corrective lenses, but his vision was monocular. *Id.* at 625. The city police department claimed it enforced a vision requirement for safety reasons. *Id.* at 628.

[17] *Id.* at 626. The police officer further claimed that he was still qualified for his job, and that the city discriminated against him based on his monocular vision. *Id.* To make out a prima facie case under the ADA, the physically impaired individual must have proven 1) he met the definition of disabled under the provisions of the ADA, 2) he was otherwise qualified to perform the job, and 3) he was terminated because of his disability. *Id. See* White v. York Int'l Corp., 45 F.3d 357, 360-61 (10th Cir. 1995) (admonishing petitioner for misinterpreting analysis set forth in another ADA case). However, in *Doane*, the important discussion dealt with the court's decision regarding the first prong: whether the police officer was disabled under the ADA. *Doane*, 115 F.3d at 627.

[18] *Id.* The court agreed with the EEOC guidelines as a permissible interpretation of the statute. *Id.* A majority of courts have sided with this interpretation and have chosen to judge a disabled individual in his unmitigated state. *Id. See* Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 630 (7th Cir. 1997) (disregarding individual's use of insulin to control his diabetes); Harris v. H & W Contracting Co., 102 F.3d 516, 520 (11th Cir. 1996) (finding that employee's Grave's Disease, though treatable, still disability under ADA); Sicard v. City of Sioux City, 950 F. Supp. 1420, 1429 (N.D. Iowa 1996) (finding ADA's definitions lacking, looked to EEOC guidelines to determine fire fighter's disability claim). *See also* Isaac S. Greaney, *The Practical Impossibility of Considering the Effect of Mitigating Measures Under the Americans with Disabilities Act of 1990*, 26 FORDHAM URB. L.J. 1267, 1291-1292 (1999) (pointing to flaws in court's rulings which choose to examine mitigating measures, claiming they fail to take into account affordability and availability of those measures to impaired individuals). Courts that have decided to examine an impaired individuals in their mitigated states ignored the seriousness of the underlying medical condition. Sheryl Rebecca Kamholz, *The Americans with Disabilities Act: Advocating Judicial Deference to the EEOC's Mitigating Measures Guidelines*, 8 B.U. PUB. INT. L.J. 99, at *8 (1999). However, Congress designed the ADA to protect the truly impaired, not those with mild impairments filing frivolous lawsuits. *Id. Cf.* Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1460 (7th Cir. 1995) (questioning doctor's disability claim as possible manipulation of legal system).

[19] *Doane*, 115 F.3d at 627-628. The court held that the police officer was substantially limited in his major life activity of seeing. *Id.* at 628. The court declined to follow a Fifth Circuit ruling, which stated that a person was not disabled, even when his vision was only correctable to 20/200. *Id. See* Chandler v.

C. Recognizing the Importance of Mitigating Measures

The First Circuit wrestled with the issue of applying mitigating measures under the ADA to a diabetic in *Arnold v. United Parcel Service, Inc.*[20] In *Arnold*, a job applicant sued UPS under the ADA, claiming that the company refused to hire him because of his diabetes mellitus.[21] The court held that the job applicant qualified as disabled under the ADA due to his medical condition, if it did not consider the mitigating effect of his medication.[22] Nevertheless, the court limited its holding to the facts of Arnold, indicating its reluctance to

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City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993) (reasoning that petitioner himself testified that he was not substantially limited by his impairment).

[20] 136 F.3d 854 (1st Cir. 1998).

[21] *Arnold*, 136 F.3d at 857. The job applicant argued he controlled his diabetes completely with medication. *Id. Cf.* Gaddy v. Four B Corp., 953 F. Supp. 331, 337 (D. Kan. 1997) (concluding that asthma sufferer controlled her attacks with medication); Murphy v. United Parcel Serv., Inc., 946 F. Supp. 872, 875 (D. Kan. 1996), *aff'd by* 119 S. Ct. 2133 (1999) (remarking that petitioner's own doctor stated that his high blood pressure, when medicated, did not hinder him in everyday activities).

[22] *Arnold*, 136 F.3d at 866. The court reviewed all statutory guidance to the ADA to reach its decision. *Id.* The court decided that when a statute's language was plain on its face, the court did not need to review its legislative history. *Id.* But when a statute's language and its legislative history both seemed ambiguous, it applied deference to an agency's interpretation, if the interpretation was a rational one. *Id. See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (outlining two-part test to determine level of deference due to agency interpretations). The EEOC's inconsistency with the ADA greatly reduced its utility as a tool of interpretation. Jonathan Bridges, *Mitigating Measures under the Americans with Disabilities Act: Interpretation and Deference in the Judicial Process*, 74 NOTRE DAME L. REV. 1061, 1071-76 (1999). The EEOC guidelines did not deserve deference, as the ADA's intent was plain on its face. *Id.* at 1073. Because the ADA needed little interpretation, the EEOC guidelines failed part one of the *Chevron* test. *Id.* The EEOC Interpretive Guidance, stated that whether an individual's impairment substantially limits a major life activity "should be made on a case-by-case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. app. § 1630.2(h) (1998) The court also looked to the legislative history of the Act for guidance. *Arnold*, 136 F.3d at 859-60. The House Labor Report on the ADA stated that one should determine an individual's disability "without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." H.R. REP. NO. 101-485, pt.II, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334. The Senate used the same language with regard to mitigating measures in its report. S. REP. NO. 101-16, at 23 (1989).

follow the EEOC's guidelines.[23] Ultimately, the court accorded the regulatory guidelines and legal history limited deference for the sake of clarity because it found the statutory language of the ADA to be ambiguous.[24]

D. A New Stance in the Interpretation of the ADA

In *Schluter v. Industrial Coils, Inc.*,[25] the District Court for the Western District of Wisconsin turned a new corner in the debate regarding whether to consider an individual's mitigating measures (such as medication or corrective lenses) when assessing a disability discrimination claim under the ADA.[26] In *Schluter*, an employee of the defendant company repeatedly failed a required vision test because of her diabetes, and the company subsequently fired her.[27] The employee filed suit against the company under the ADA, claiming it discriminated against her based on her disability.[28] The court found that the employee was not disabled under the ADA because she could correct her vision, which did not substantially limit her in a major life activity.[29] Rejecting the EEOC's interpretation of the ADA that the agency had promulgated, the court expressed that it was necessary to assess individuals in their mitigated state.[30]

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[23] *Arnold*, 136 F.3d at 866. The court explained that if the facts of an ADA case were different and perhaps involved a correctable vision impairment, it might come to a different conclusion. *Id.* at 866 n.10. The Fifth Circuit noted that it was more rational to consider mitigating factors, but it was not enough to overrule the EEOC's authority. Washington v. HCA Health Serv., 152 F.3d 464, 470 (5th Cir. 1998), *vacated,* 119 S. Ct. 2388 (1999). However, the court limited its holding to apply the EEOC guidelines only to serious impairments. *Id. See* Gilday v. Mecosta County, 124 F.3d 760, 766-67 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part) (expressing concern that EEOC's regulatory guidelines' instruction against assessing individual with his mitigating measures contradicted statutory language of ADA). *But see* Ellison v. Software Spectrum, Inc., 85 F.3d 187, 191 (5th Cir. 1996) (addressing Congress' intent in ADA with no reference in statute to determining disabilities in individual's unmitigated state).

[24] *Arnold*, 136 F.3d at 859, 866. The court reasoned that the EEOC guidelines and legislative history coincided with the broad, remedial purposes of the ADA for which Congress designed it. *Id.* at 861. *See* Webb v. Garelick Mfg. Co., 94 F.3d 484, 487 (8th Cir. 1996) (outlining correct ADA disability analysis as remedial for individual with rare focal dystonia).

[25] 928 F. Supp. 1437 (W.D. Wis. 1996).

[26] *Schluter*, 928 F. Supp. at 1445. The court found that the EEOC's interpretive guidance was not reconcilable with the clear language of the ADA, which required individuals to show that their lives were substantially limited by their impairments. *Id.* The EEOC guidelines eliminated the "substantially limits" requirement from the ADA. Testerman v. Chrysler Corp., No. CIV. A. 95-240MMS, 1997 WL 820934, at *9 (D. Del. Dec. 30, 1997). Though the decision against the EEOC guidelines' relevance produced future negative effects, those effects were for Congress to handle, not courts and judges. *Id.* at *10.

[27] *Schluter*, 928 F. Supp. at 1442-43. The company required a vision test of all its employees after it received a government contract which contained certain

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job-related specifications. *Id.* at 1442. The company offered to employ her elsewhere within the factory, but the employee did not know of any other jobs she could perform in her condition. *Id.* at 1443.

[28] *Id.* The employee claimed she was substantially limited in the major life activity of working. *Id.* at 1447.

[29] *Id.* at 1446. The court explained that the employee failed to show the court how her poor eyesight substantially limited her in any major activities since her vision was partially correctable with a magnifier and eyeglasses. *Id.*

[30] *Id.* at 1445. The court reasoned that the ADA required consideration of mitigating factors to effectuate the "substantially limits" prong of the disability assessment. *Id.* The statutory configuration of the ADA has led to detailed queries into its meaning. Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 864 (1st Cir. 1998). *See* Timothy Stewart Bland, *The Determination of Disability under the ADA: Should Mitigating Factors Such as Medications Be Considered?*, 35 IDAHO L. REV. 265, 281-82 (1999) (citing several examples, such as individual with high blood pressure, where mitigating effect of medication relieves need for protection against discrimination); Michael J. Puma, Note, *Respecting the Plain Language of the ADA: A Textualist Argument Rejecting the EEOC's Analysis of Controlled Disabilities*, 67 GEO. WASH. L. REV. 123, 145-48 (1998) (proposing that amendment be made to ADA to clarify focus of statute to assess individuals in their mitigated state). Other district courts have also expressed their disapproval of the EEOC's guidance in this matter. *Schluter*, 928 F. Supp. at 1444. *See* Cline v. Fort Howard Corp., 963 F. Supp. 1075, 1081 n.6 (E.D. Okla. 1997) (arguing that person cannot be considered substantially limited in their major life activities if she wears contacts or eyeglasses to remedy condition); Gaddy v. Four B Corp., 953 F. Supp. 331, 337 (D. Kan. 1997) (evaluating asthma sufferer in her medicated state using straightforward language of ADA); Moore v. City of Overland Park, 950 F. Supp. 1081, 1088 (D. Kan. 1996) (following earlier opinion advocating use of mitigating factors to avoid conflict with statutory meaning of ADA).

The Supreme Court faced the quandary of interpreting the ADA's meaning. Susan E. Dallas, Sutton: *Use of Mitigating Measures to Determine Disability Under the ADA*, 1999 COLO. LAW. 59, 61. Circuit courts were sharply divided on the issue of mitigating measures. *Id.* at 60. *See* Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133, 2139 (1999) (affirming Tenth Circuit's holding that job applicant with hypertension was not substantially limited in major life activity; thus, applicant was not disabled to qualify for protection under ADA). The Supreme Court refused to address how much deference the EEOC guidelines deserved. Albertson's

III. *SUTTON V. UNITED AIR LINES, INC.*

A. *Opinion of the Court*

In *Sutton v. United Air Lines, Inc.*,[31] the Court held that an impaired individual must be assessed utilizing his particular mitigating measure when determining if that individual had a discernable disability under the ADA.[32]

Initially, the Court explained that Congress had not given any agency the authority to interpret the term "disability" as it appears in the Act.[33] The Court recognized that the EEOC issued guidelines defining this term, but found them to be a misinterpretation of the statute.[34] In order for an impairment to "substantially limit" an individual in a major life activity, the Court reasoned that the individual must be evaluated in his mitigated, present state.[35] The guidelines generated by

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v. Kirkingburg, 119 S. Ct. 2162, 2167-68 n.10 (1999). The truck driver received a waiver of the Department of Transportation's vision standards and still was not hired. *Albertson's,* 119 S. Ct. at 2166. Nevertheless, this did not make him disabled or discriminated against based on his monocular vision under the provisions of the ADA. *Id.* at 2169.

[31] 119 S. Ct. 2139 (1999).

[32] *Sutton,* 119 S. Ct. at 2149. The Court explained that the statute required an individualized inquiry that could not be fulfilled without considering mitigating measures. *Id.* The Court further held that the sisters were not "regarded as" disabled by United. *Id.* at 2152. Their only basis for this contention consisted of United's vision requirement, which the sisters claimed was indicative of United's belief that visually impaired persons are disabled. *Id.* at 2150. They also claimed the vision requirement prevented their employment in the class of jobs of "global airline pilot." *Id.* The Court stated that 1) employers are allowed under the EEOC and ADA to have physical requirements for jobs and 2) "global airline pilot" is not a class of jobs. *Id.* The Court explained that the sisters were qualified to fill a number of pilot positions at United and were only limited in the single job of "global airline pilot." *Id.* at 2151.

[33] *Id.* at 2145. The general provisions at the beginning of the ADA are not located under any title of the Act. *Id.*

[34] *Id.* at 2146. The Court declined to discuss the amount of deference to accord to these guidelines because the parties accepted them as valid. *Id.* at 2141. Still, though the Court did not address the guidelines' importance, its holding went directly against their interpretation. *Id.* at 2149.

[35] *Id.* at 2152. The Court stressed the importance of the verb form of the phrase "substantially limits" found in the statutory language of the ADA, which was the present indicative. *Id.* The phrase indicated the need to assess an individual as he or she functions in daily life, not in a hypothetical state. *Id.* The Court also indicated that it considered the side effects of an ameliorative measure

the EEOC promoted speculation and generalization about an individual's unmitigated condition, which contradicts the individualized inquiry that the ADA requires.[36]

The Court then addressed Congress' intent based on its findings prior to passing the ADA.[37] The forty-three million people Congress referred to in its findings constituted a portion of the population too small to include all physically impaired individuals in their uncorrected state.[38] The findings indicated that if Congress had intended for the statute to encompass all individuals with a physical or medical condition, the number of qualified persons would be far greater than forty-three million.[39] This finding was a key factor in the Court's determination of Congress' intent.[40]

B. *Justice Ginsburg's Concurring Opinion*

Justice Ginsburg concurred with the Court's examination of Congress's intent, but Justice Ginsburg found congressional support for the majority's proposition in the language of the ADA itself.[41] Justice Ginsburg argued that the Act was de-

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when assessing an individual in his or her everyday condition. *Id.* at 2147.

[36] *Id.* The individualized inquiry of each person and the disability is important to carry out the provisions of the ADA correctly. *Id.* Without this inquiry, individuals would be assessed as members of disabled categories classified by impairments. *Id.*

[37] *Id.* The findings in the ADA stated that roughly forty-three million U.S. citizens had some form of disability. *Id.* The Court used this figure to decipher congressional intent. *Id.*

[38] *Id.* at 2149. The Court discussed the origins of the forty-three million figure and found it consistent with the 37.3 million reported by the bill's findings in 1988. *Id.* at 2148. The figure helped the Court to determine that Congress did not consider that the Act protected all physically impaired individuals. *Id.* at 2147.

[39] *Id.* According to the National Council on Disability, 160 million Americans had a health condition in 1986. *Id.* Roughly 100 million citizens had a vision impairment in 1998. *Id.*

[40] *Id.* at 2149. The Court reasoned that the congressional findings were clues to the legislature's purposes with the Act. *Id.*

[41] *Id.* at 2152 (Ginsburg, J., concurring). Justice Ginsburg found no room for persons with a correctable vision impairment in the description of the disabled in the ADA, which characterized them as powerless in society. *Id.* (Ginsburg, J., concurring).

signed to protect the disabled who are disadvantaged in society and need the support of the ADA to prevent occurrences of injustice against them.[42] Justice Ginsburg could not conclude that Congress intended that someone with a correctable vision impairment needed the protection afforded under the Act or needed to be included in that class of individuals.[43]

C. Justice Stevens' Dissenting Opinion

Justice Stevens dissented in the *Sutton* decision and interpreted the purpose of the ADA to be broad and remedial, in contrast to the majority's restrictive approach.[44] Justice Stevens pointed to the majority of federal circuit courts that had also found that the statute included individuals that mitigated their medical conditions.[45] Justice Stevens argued that when one reads the ADA as a whole, one would find that it includes present as well as past impairments.[46] Justice Stevens placed importance on the weight of legislative history accompanying the Act, the clout of agency interpretations, and the support of both for his contention of omitting mitigating factors in the assessment of an impaired individual.[47]

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[42] *Id.* (Ginsburg, J., concurring). Justice Ginsburg referred to language in the ADA stating that the disabled were a "discrete and insular minority" historically absent the political power necessary to combat unfair treatment. *Id.* (Ginsburg, J., concurring).

[43] *Id.* (Ginsburg, J., concurring). Justice Ginsburg found the purpose of the Act was to restrict its protection to that limited section of the population that truly required its assistance. *Id.* (Ginsburg, J., concurring).

[44] *Id.* at 2152 (Stevens, J., dissenting). Justice Stevens found the statute intended to encompass a greater section of the population with its remedial purpose. *Id.* (Stevens, J., dissenting).

[45] *Id.* at 2153. (Stevens, J., dissenting). Justice Stevens pointed to the rulings of eight out of nine circuit courts. *Id.* (Stevens, J., dissenting).

[46] *Id.* at 2153-54 (Stevens, J., dissenting). Reading the statute as a whole, Justice Stevens found the ADA also covered having a record of an impairment that countered the majority's requirement that an impairment presently limits an individual. *Id.* (Stevens, J., dissenting).

[47] *Id.* at 2155 (Stevens, J. dissenting). Justice Stevens cited to the three government agencies instructed to issue regulations on the Act (Department of Justice, Attorney General, EEOC) and how they consistently interpreted the statute to include individuals with mitigating factors. *Id.* at 2155-56 (Stevens, J., dissenting). Justice Stevens further contended that the majority decision forces disabled individuals into groups by allowing employers to reject job applicants based on

D. *Justice Breyer's Dissenting Opinion*

Justice Breyer dissented, stating that at this critical juncture of the future of the ADA, the Court should err on the more broad, protective side of the statute for the sake of those individuals that Congress designed the Act to protect.[48] Justice Breyer argued that the EEOC could issue another regulation to define terms under its respective subchapter, helping to alleviate more frivolous lawsuits by the less impaired.[49] Justice Breyer found that Congress did not intend for its stylistic placement of definitions to remove any effectiveness from the powers of the ADA and the agencies who were directed to implement them.[50]

IV. DISCUSSION

In *Sutton v. United Air Lines, Inc.,* the Supreme Court sided with a minority of circuit courts to alter dramatically the ramifications of an ADA disability discrimination charge.[51] The Court discussed the need for an individualized inquiry into each disability claim and found that the EEOC guidelines misinterpreted this basic premise.[52] Although the Court declined to decide the amount of deference to accord to the

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their general medical conditions. *Id.* at 2158-59 (Stevens, J., dissenting).

[48] *Id.* at 2161 (Breyer, J., dissenting). Justice Breyer explained that narrowing the scope of the ADA would exclude some of the individuals who qualify as disabled and need the Act's protection. *Id.* (Breyer, J., dissenting).

[49] *Id.* (Breyer, J., dissenting). Justice Breyer argues that the EEOC's added guidelines could prevent frivolous lawsuits by unqualified individuals. *Id.* at 2161-62 (Breyer, J., dissenting).

[50] *Id.* at 2162 (Breyer, J., dissenting). According to Justice Breyer, the location of the definitions in the ADA (preceding Title I of the Act) should not play a role in limiting its importance. *Id.* (Breyer, J., dissenting).

[51] *See supra* notes 11, 21, 31 and accompanying text. The Supreme Court's ruling conflicted with previous circuit court decisions in almost every circuit. *See supra* note 17 and accompanying text.

[52] *See supra* notes 13, 23 and accompanying text. The EEOC's guidelines take away the need for a "substantially limits" prong under the ADA and make the inquiry a speculative one. *See supra* note 23 and accompanying text. *But see supra* notes 15, 18 and accompanying text. Many courts followed the EEOC's guidelines and considered them to be a valid interpretation of the ADA. *See supra* note 17 and accompanying text.

agency's interpretations, the decision in *Sutton* directly counters the guidelines' language.[53]

Now that courts must consider mitigating factors that impaired individuals utilize, the flow of ADA lawsuits will dramatically decline.[54] The *Sutton* decision represents a coup for employers since the Supreme Court has greatly reduced the chance that an impaired individual can maintain an ADA discrimination claim against them.[55] Accordingly, the burden of proof for disabled employees is so great that their impairment must indeed be severe to qualify as a disability under the ADA.[56] The physically impaired now have a difficult question to face: In their mitigated state, are they still substantially limited in a major life activity?[57] To answer in the affirmative is a great task when one considers that medical conditions that were once fatal are now fully treatable.[58]

The decision has also given the individualized inquiry a renewed importance in determining ADA claims.[59] The inquiry tailors the law to the particular person in each case and discourages across-the-board decisions regarding certain types of impairments.[60] Although the scope of the statute is now narrow and very focused, it is simultaneously true to the Act's original purpose: protecting the disabled.[61]

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[53] *See supra* notes 22, 26 and accompanying text. Courts and legal scholars alike have debated over the amount of deference the EEOC guidelines deserve. *See supra* note 22 and accompanying text.

[54] *See supra* notes 18, 21, 26 30 and accompanying text. The scope of the statute is now narrower, reducing the amount of abuse of the statute by plaintiffs who want to profit wrongfully from the discrimination claim. *See supra* note 18 and accompanying text.

[55] *See supra* notes 21, 23, 29, 30 and accompanying text. The focus of the ADA has shifted away from the discrimination section of the statute on to the disability determination, which courts will closely scrutinize in the future. *See supra* note 30 and accompanying text.

[56] *See supra* notes 17, 21, 23, 26, 29, 30 and accompanying text. The language "substantially limits" is vague, and courts must now discern where they will draw the statutory line between disabled and just physically impaired. *See supra* note 19 and accompanying text.

[57] *See supra* notes 21, 23, 26 and accompanying text. The future ADA plaintiffs will need to offer evidence of severe effects from their medical conditions for courts to assess them still as disabled. *See supra* note 26 and accompanying text.

[58] *See supra* note 21, 26, 29 and accompanying text. Medical conditions such as diabetes, hypertension, and asthma can now be treated, so that the affected individual can live a relatively normal life. *See supra* note 21 and accompanying text.

[59] *See supra* notes 11, 13 and accompanying text. Although not the main focus of *Bragdon*, the individualized inquiry is a critical factor in determining whether an individual has a disability. *See supra* note 13 and accompanying text.

V. CONCLUSION

The Court's opinion in *Sutton* has dramatically altered the scope of employment law. The ADA contains protection from discrimination for all individuals who, even with the help of medication or other measures, still cannot enjoy the daily normalcy of the unimpaired person. For these individuals, the Supreme Court has defined, rather than narrowed, the term "disability" under the ADA. Although the narrowness of the statute seems harsh to those just outside the scope of its coverage, the Court has clarified the statute for a realistic, workable approach, so that both employers and employees understand their rights in the workplace.

Erin Argo

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[60] *See supra* note 13 and accompanying text. The Court in *Sutton* emphasized the "case-by-case" mandate of the ADA and combined this with the purpose of considering mitigating measures. *See supra* note 13 and accompanying text. *But see supra* note 15 and accompanying text.

[61] *See supra* notes 13, 26, 30 and accompanying text. If Congress feels that the Supreme Court has misinterpreted the ADA, it can pass an amendment to alter the scope of the statute. *See supra* note 26 and accompanying text.

CONSTITUTIONAL LAW—FIRST AMENDMENT—FEDERAL PROHIBITIONS ON ADVERTISING FOR PRIVATE CASINOS ARE UNCONSTITUTIONAL IF SUCH ADVERTISING IS BROADCAST FROM STATIONS IN STATES WHERE SUCH GAMING IS LAWFUL

I. FACTS

In February 1994, an association of Louisiana broadcasters and its various members, who operate both television and radio stations in the greater New Orleans metropolitan area, brought suit against the United States and the Federal Communications Commission (FCC), seeking injunctive relief and a declaratory judgment allowing them to broadcast advertisements for private gambling at area casinos.[1] This association contended that without the threat of legal and regulatory sanctions pursuant to 18 U.S.C. § 1304 and the FCC's companion regulation, 47 C.F.R. § 73.1211, its various members would be free to broadcast advertisements at television and radio stations in New Orleans for gambling available at private casinos that are lawful in Louisiana.[2] The plaintiffs brought suit in the United States District Court for the Eastern District of Louisiana, praying for a declaration that 18 U.S.C. § 1304 violated their First Amendment rights and for an injunction preventing the FCC from enforcing the statute against them.[3] The district court, after all parties had agreed that the case should be decided on the basis of the parties' cross-motions for summary judgment, entered judgment in favor of the Government in November 1994.[4] A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's granting of summary judgment in favor of the Government.[5] The United States Supreme Court then vacated the Court of Appeals' judgment and remanded the case to the Fifth Circuit for further consideration.[6]

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[1] Greater New Orleans Broad. Ass'n, v. United States, 119 S. Ct. 1923, 1928-29 (1999). This association specifically consisted of the Greater New Orleans Broadcasters Association (GNOBA) and a group of radio and television stations in the New Orleans area. Greater New Orleans Broad. Ass'n v. United States, 69 F.3d 1296, 1298 (5th Cir. 1995). GNOBA is a non-profit corporation which is organized for the purpose of representing its various members as a trade association in those matters that affect the broadcasting industry. *Id.*

[2] *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1928. Although 18 U.S.C. § 1304 is a criminal statute, the Solicitor General conceded that the statute has traditionally been enforced by the FCC, which imposes administrative sanctions on television and radio stations for violations of 47 C.F.R. § 73.1211, which parallels 18 U.S.C. § 1304. *Id.* at 1927. This section of the United States Code, 18 U.S.C. § 1304, provides that any radio or television station which knowingly permits the broadcasting of any advertisement for any lottery or any other games of chance shall be either fined or imprisoned for no more than one year.

The Fifth Circuit again adhered to its previous conclusion.[7] Citing conflict between circuits, the United States Supreme Court granted the broadcasters' petition for certiorari and held: reversed.[8] The Court held that the federal prohibition on radio and television broadcast advertisements of private casino gambling violates the First Amendment where the advertisements are carried by radio or television stations in states where such gambling itself is legal.[9]

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[3] Id. at 1928-29. The plaintiffs contended that casino gambling does not fall within the purview of 18 U.S.C. § 1304; in the alternative, they contended that 18 U.S.C. § 1304 violated their First Amendment free speech rights. *Greater New Orleans Broad. Ass'n*, 69 F.3d at 1298.

[4] *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1929. The district court determined that casino advertising falls within the purview of 18 U.S.C. § 1304, and that the statute did not violate the First Amendment. *Greater New Orleans Broad. Ass'n*, 69 F.3d at 1298. The plaintiffs appealed each of those holdings to the Fifth Circuit. *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1929-30.

[5] *Id.* at 1929. The panel consisted of Chief Judge Politz, as well as Circuit Judges Jones and Parker. *Greater New Orleans Broad. Ass'n*, 69 F.3d at 1298. Chief Judge Politz dissented from the majority holding, contending that 18 U.S.C. § 1304 serves little purpose, as it is "deeply gutted by exceptions and in conflict with the policies of many states which have legalized gambling." *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1303; *see infra* note 60 and accompanying text.

[6] *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1929. The Supreme Court cited its holding in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), which had "rejected the argument that the power to restrict speech about certain socially harmful activities was as broad as the power to restrict such conduct." *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1929.

[7] *Id.* Chief Judge Politz again dissented from the majority holding. *Greater New Orleans Broad. Ass'n*, 149 F.3d at 341.

[8] *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1929-30. The Supreme Court noted that it again granted certiorari because the Ninth Circuit had reached a contrary result in *Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (1997), *cert. denied*, 522 U.S. 1115 (1998), as had a federal district court in

II. RELATED LAW

A. *The Roots of the Commercial Speech Doctrine*

The United States Supreme Court first articulated the commercial speech doctrine in *Valentine v. Chrestensen*.[10] In *Valentine*, an entrepreneur was prevented from distributing advertising handbills pursuant to a local ordinance.[11] Justice Roberts, in a brief but unanimous opinion, declared that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising."[12] The Court's opinion, however, cited no authority for any such distinction between commercial and noncommercial speech.[13] Though the com-

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Players Int'l, Inc. v. United States, 988 F. Supp. 497 (D.N.J. 1997). *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1929- 30; *see infra* note 60 and accompanying text.

[9] *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1936.

[10] 316 U.S. 52 (1942).

[11] *Valentine*, 316 U.S. at 53. The plaintiff brought suit to enjoin enforcement of a New York City ordinance that prevented him from printing and distributing handbills advertising his retired Navy submarine. *Id.* at 53-54.

[12] *Id.* at 54. The Court further held that "[w]hether and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment." *Id.*

[13] *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990). Many proponents of the commercial/noncommercial speech dichotomy argue that the "Framers evidenced absolutely no interest in protecting commercial speech so it would be a gross misinterpretation of the first amendment to construe it to afford commercial speech the same level of protection as political speech." *Id.* at 633. Some proponents of the distinction argue that fully protecting commercial speech will only dilute the protection afforded to noncommercial speech and draw some of the necessary protections away from the latter type of speech. *See* Floyd Abrams, *Symposium — Liberty and Justice for All: Protecting Individual Rights Under the Constitution*, 41 RUTGERS L. REV. 717, 750-51 (1989). Finally, other proponents of the distinction argue that to afford commercial speech the same First Amendment protections as noncommercial speech will leave the government helpless in its fight against

mercial speech doctrine has metamorphosed considerably since *Valentine*, in that the Court has granted commercial speech some protection, the commercial/noncommercial speech distinction has remained thoroughly embedded in the law.[14] Until very recently, in commercial free speech cases, courts, "armed with precedent, have been able to revert to the [*Valentine*] technique of stating the distinction as an axiom."[15]

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misleading information and consumer fraud. Allan C. Hutchison, *Talking the Good Life: From Free Speech to Democratic Dialogue*, 1 YALE J.L. & LIB. 17, 29 (1989). *See* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 12-15, at 903 (2d ed. 1988) (arguing commercial speech doctrine represents reasonable accommodation of right of public to speak and to hear about commercial goods and services, and right of government to regulate such goods and services); Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 57 (1999) (arguing current commercial speech framework should be retained because it can accommodate First Amendment protections desired by all but most zealous free speech advocates). *See also* Friedman v. Rogers, 440 U.S. 1, 8-9 (1979) (holding individual advertisement which is purely "commercial" may nonetheless be matter of general public importance). Judge Robert Bork has argued, however, that "[t]he framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject. . . . The first amendment, like the rest of the Bill or Rights, appears to have been a hastily drafted document upon which little thought was expended." *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971).

The Court has itself advanced two justifications for the commercial speech doctrine: "First, commercial speech is supposedly more objective than noncommercial speech because its truth is more easily verifiable. Second, because commercial speech is engaged in for profit, it is claimed to be more durable than noncommercial speech. As a result, it is less susceptible to being chilled by proper regulation." Kozinski & Banner, *supra*, at 634. Although the term "commercial speech" is itself ambiguous and there are numerous things that are exempted which would otherwise seem to fall in this broad category (e.g., speech that solicits money, speech in a form sold for profit, or speech on a commercial subject), the Court defined "commercial speech" in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) as that speech which does "no more than propose a commercial transaction." For a discussion of what constitutes commercial speech, see Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case For Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1993).

[14] Kozinski & Banner, *supra* note 13, at 628.

[15] *Id.*

B. Commercial Speech Protected by the First Amendment

In *Virginia Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, the Supreme Court considered whether commercial speech is indeed entitled to *some* First Amendment protections.[16] In *Virginia Board of Pharmacy*, the Court invalidated a state restriction on price advertisements by pharmacists for prescription drugs.[17] The Court framed the issue as whether or not a state may regulate speech which simply proposes a commercial transaction and in no way relates to any fundamental right or important social discourse.[18] Accordingly, the Court determined that, even if the motives of the advertisers were purely commercial and unrelated to any "high value" speech, their speech could not be disqualified from First Amendment protection.[19] As to the consumers, the Court noted that oftentimes a consumer's interests are as great in the free flow of commercial information as in the day's most important political concerns.[20] Hence, even an advertisement may be of general public interest and importance.[21]

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[16] 425 U.S. 748 (1976).

[17] *Virginia Bd. of Pharmacy*, 425 U.S. at 773. The suit was brought by Virginia prescription drug consumers who claimed that the First Amendment protected their right to receive, as well as the right of pharmacists to advertise, prescription drugs. *Id.* at 753. Against arguments that the plaintiffs, as potential recipients (as opposed to providers) of such information, were not protected by the First Amendment, the Court determined that "where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both." *Id.* at 756.

[18] *Id.* at 761-62.

[19] *Id.* at 762. The Court looked to the situation of a manufacturer in that neither he nor labor representatives in a labor dispute could be constitutionally foreclosed from expressing their ideas and notions about such a dispute so as to influence its outcome, even though each side's interests would be overwhelmingly motivated by economic concerns. *Id.* By the same token, the Court noted that since the "fate of . . . a 'single factory'" could also be greatly affected by an inability to advertise its wares, the Court saw no reason to take away First Amendment protections from this latter type of speech. *Id.* at 762-63.

[20] *Id.* at 763.

[21] *Id.* at 764. This was, according to the Court, especially true in cases such as this, where the poor, the sick, and the aged would be hardest hit by restrictions on advertising of such a socially beneficial industry as prescription drugs.

Virginia asserted that its prescription drug ban was motivated by a concern to preserve the professionalism of pharmacists and prevent their status from deteriorating into that of "mere retailer."[22] The Court found that Virginia pharmacists were already subjected to rigorous licensing standards as to their professional conduct, and that "the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance" since the advertising ban had no substantial effect at all on the professional standards or conduct of pharmacists.[23] The Court hence determined that "[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that *the First Amendment makes for us*."[24] The Court did however go to pains to make clear that it did not hold that time, place, and manner restrictions were necessarily unconstitutional with regard to commercial speech, but that such a complete ban on commercial speech based on its *content* could not be constitutionally upheld unless provably false, deceptive, or misleading.[25] Even so, this first clear dec-

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Id. at 763-64. The Court also noted that the "free flow" of commercial ideas is "indispensable" with regard to the rational decision-making processes of consumers if the United States is to preserve a free market economy. *Id.* at 765.

[22] *Id.* at 767-68.

[23] *Id.* at 769. The Court premised this proposition on the belief that all persons will act rationally and in their own best interests if they are only fully informed about the drugs they need to obtain. *Id.* at 770. For instance, the "highly professional" pharmacist might advertise the allegedly superior quality of his product and thereby still retain a significant share of the market even if his prices are somewhat higher. *Id.*

[24] *Id.* (emphasis added). Justice Rehnquist dissented, arguing that the majority had failed to adhere to the Court's previous jurisprudence and that the Virginia Legislature was the proper body to weigh competing policy arguments and could, therefore, not be required to "hew to the teachings of Adam Smith in its legislative decisions." *Id.* at 782-84 (Rehnquist, J., dissenting). He further maintained that the Court had drawn a murky line between misleading and nonmisleading commercial speech that is just as untenable as that distinguishing commercial speech from noncommercial speech. *Id.* at 787 (Rehnquist, J., dissenting). Justice Rehnquist emphasized that he had previously understood the First Amendment to protect speech regarding "political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo." *Id.* (Rehnquist, J., dissenting).

[25] *Id.* at 771. The Court further emphasized that commercial speech is still

laration of any First Amendment protection for commercial speech marked a tremendous shift in the Court's commercial speech jurisprudence, though no test for when commercial speech may be constitutionally restricted was fully elaborated in the *Virginia Board of Pharmacy* opinion.[26]

C. *The* Central Hudson *Four-Part Test*

In 1980, another major development in commercial speech jurisprudence occurred when the Court, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, announced a four-part test to assess the constitutionality of restrictions on commercial speech: whether such speech (1) concerns lawful activity and is not misleading and (2) whether the asserted government interest is substantial; if both of these questions are answered in the affirmative, it must be determined whether the regulation (3) directly advances the asserted interest and (4) whether or not it is more

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differentiable from other varieties of speech and may call for a different degree of protection because of its supposed durability and readily verifiable nature. *Id.* at 772 n.24; *see supra* note 13 and accompanying text. *See also* Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985) (declaring that commercial speech is less central to interests of First Amendment than issues of public importance); *In re* R.M.J., 455 U.S. 191, 203 (1982) (holding that misleading commercial advertising may be totally prohibited, but that nonmisleading information may be regulated though not prohibited).

Chief Justice Burger's concurring opinion in *Virginia Board of Pharmacy* stressed that the Court's decision wisely left for another day the question of what types of advertising for professional services might be termed misleading, perhaps inherently so in light of the undeniably individualized services provided by professionals. *Virginia Bd. of Pharmacy*, 425 U.S. at 775. Justice Stewart also wrote a concurring opinion, which emphasized that commercial speech is entitled to some measure of First Amendment protection because of the valuable information it conveys to the public rather than any contribution to the marketplace of ideas. *Id.* at 780. Furthermore, within this rubric, "the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection: its contribution to the flow of accurate and reliable information relevant to private and public decisionmaking." *Id.* at 781.

[26] Aaron A. Schmall, Comment, *Sobriety Test: The Court Walks the Central Hudson Line Once Again in 44 Liquormart, but Passes on a New First Amendment Review,* 50 FED. COMM. L.J. 753, 757 (1998).

extensive than necessary to contribute to that interest.[27] If these third and fourth prongs of the test are also satisfied, then the government may regulate the commercial speech at issue.[28]

In *Central Hudson Gas & Electric*, an electric utility brought suit against the New York Public Service Commission because of the latter's ban on all advertising promoting the use of electricity.[29] The Court held with little discussion that the Commission's twin interests in conserving electricity and ensuring that rate structures remain fair and efficient in their administration.[30] Accordingly, the Court focused its inquiry on the relationship between the government's interests and the advertising restriction.[31] The Court held that there could be no logical link between the equity of the plaintiff's rate structure and the speech at issue that could justify the speech restriction, but did decide that there was an immediate connection between the advertising restriction and the conservation of electricity that would justify such a restriction.[32]

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[27] 447 U.S. 557, 563-65 (1980).

[28] *Central Hudson Gas & Elec.*, 447 U.S. at 563-65. The Commission did not claim the proposed speech was unlawful or misleading. *Id.* at 566.

[29] *Id.* at 558-59. The Commission had originally put the advertising restriction in place in the winter of 1973-74 as a response to inadequate fuel supplies to meet consumer demand. *Id.* at 559. After this fuel shortage had passed, however, the Commission left the advertising prohibition in place after reviewing public comments on the issue. *Id.* The Commission found that promotional advertising for electric utilities was directly contrary to the national goal of conserving scarce energy resources. *Id.* The Commission reached this conclusion in spite of the fact that oil dealers fell outside of its purview because its restriction could still result in at least "some dampening of unnecessary growth . . . in energy consumption." *Id.* at 559-60. The Commission's order did allow "informational advertising" designed to discourage heavy electricity consumption at peak consumption times. *Id.* at 560.

The Court immediately rejected the argument that the speech at issue could be fully regulated or even banned because of the monopoly of the electricity market, which the plaintiff enjoyed: "Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purposes of the First Amendment." *Id.* at 567. Furthermore, the Court reasoned that the plaintiff was actually competing with oil and natural gas suppliers for a share of the market. *Id.*

[30] *Id.* at 568-69.

[31] *Id.* at 569.

The Court, therefore, focused its "critical inquiry" on whether the advertising ban was more extensive than necessary to further the government's interests.[33] The Court held that the state had failed to satisfy this burden because there was no showing made that a more limited speech restriction could not as easily serve the state's interests; furthermore, this broad restriction would eliminate speech about electricity sources that would cause no net increase in energy use anyway and would perhaps even reduce overall energy consumption.[34]

Justice Rehnquist dissented from the majority holding; he stressed that the Court's new four-part test improperly substituted the policy judgments of the Court in place of those of the New York legislature and, more importantly, gave unnecessary First Amendment protection to a highly regulated industry that should not be entitled to any such protection.[35]

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[32] *Id.*

[33] *Id.* at 569-70.

[34] *Id.* at 570. The Court noted that, for instance, the State could require any advertisements to carry disclaimers about the expense and efficiency of the offered service, or it could preview advertisements to ensure that they will not conflict with New York's conservationist policies. *Id.* at 571. As a result, the Court held that, "[i]n the absence of a showing that more limited speech regulation would be ineffective," the advertising ban could not be upheld. *Id.* Justice Brennan's concurring opinion stressed that there should be no distinction between commercial and noncommercial speech that would justify the suppression of the former solely for the purpose of influencing public conduct through such regulation. *Id.* at 572. Justice Blackmun's concurring opinion emphasized his fear that the third prong of the *Central Hudson* test could leave open the possibility that a state could totally suppress speech just for the purpose of lessening demand for a particular product or service because of the Court's willingness to find a direct link in this case even in the absence of empirical data or other supporting authority. *Id.* at 573. Thus, Justice Blackmun stressed that the *Central Hudson* test might not provide adequate protection to commercial speech that is neither untruthful nor misleading. *Id.* Justice Stevens also wrote a concurring opinion in which he argued that this case should not even be addressed within the confines of the commercial speech rubric because the topic of energy conservation so readily lends itself to political and public policy considerations that are wholly different from "ordinary" advertising for commercial transactions. *Id.* at 578-79.

[35] *Id.* at 584-85.

D. Legislative Deference and the Power To Regulate Vice Activities

The Supreme Court addressed the issue of selective gambling advertising restrictions in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico.*[36] In *Posadas*, the Court upheld a Puerto Rican statute restricting virtually all advertising for private casino gambling from Puerto Rican residents, while allowing such advertisements to reach tourists, because "*the greater power* to completely ban casino gambling *necessarily includes the lesser power* to ban advertising of casino gambling . . . ."[37] The Court determined that without a doubt the challenged statute directly fostered the legislature's substantial interest in that the "[l]egislature obviously believed when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised."[38] The Court greatly limited its inquiry to whether the legislature's belief was a reasonable one and observed that the fact that the casino had litigated the case all the way to the Court indicated it also shared the legislature's view that the regulation at issue served its purpose of decreasing demand for casino gambling among Puerto Rican residents.[39] Finally, the Court determined that the advertisement restrictions were no more extensive than necessary to serve the legislature's substantial interest because they only restricted the advertising aimed at Puerto Ricans, not tourists.[40] Both Justice Brennan and Justice Stevens wrote dissenting opinions, each arguing that Puerto Rico's casino advertising restraints violated the First Amendment.[41]

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[36] 478 U.S. 328 (1986).

[37] *Posadas*, 478 U.S. at 345-46 (emphasis added). The law at issue provided that "'[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico.'" *Id.* at 332. The Court held that the first part of the *Central Hudson* test was clearly satisfied because the speech at issue was neither misleading nor concerning any unlawful activity. *Id.* at 340-341. As to the second prong of the *Central Hudson* test, the Court held that the Puerto Rican legislature has a substantial interest in the health, safety, and morals of its citizens. *Id.* at 341. *See* Renton v. Playtime Theaters, Inc., 475 U.S. 41, 54 (1986) (holding city has substantial interest in preserving its quality of life); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (upholding state bar association's ban on in-person solicitation because state retains power to regulate commercial activity deemed socially harmful when speech itself is component of that activity).

[38] *Posadas*, 478 U.S. at 341-42.

[39] *Id.* at 342. *See* Florida Bar v. Went For It, Inc., 515 U.S. 618, 633-34 (1995) (holding that challenged regulation must be "reasonably well tailored" to

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achieve government's substantial interest); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 509 (1981) (holding that commercial speech restriction directly advances government's asserted interest when legislative judgment is "not manifestly unreasonable"); Dunagin v. City of Oxford, 718 F.2d 738, 750 (1983) (upholding ban on liquor advertising because of "sufficient reason" to believe that advertising and consumption of alcohol are inextricably linked, even though there was no concrete evidence presented to court).

The *Posadas* Court quickly dismissed the casino's argument that the statute should be held unconstitutional in that it failed to shield Puerto Ricans from the supposed social ills associated with horse racing, cockfighting, and lotteries because the legislature's narrow interest was "not necessarily to reduce demand for all games of chance, but to reduce demand for casino gambling" and because the demand for games of chance would be reduced, in general, by the enforcement of the regulation. *Posadas*, 478 U.S. at 342.

[40] *Id.* at 343. The Court rejected the casino's contention that the legislature be required to promulgate counterspeech designed to discourage gambling among Puerto Ricans because "*it is up to the legislature* to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising." *Id.* at 344 (emphasis added).

[41] *Id.* at 349, 359 (Brennan, J., dissenting). Justice Brennan, joined by Justices Marshall and Blackmun, dissented, forcefully arguing that the legislature could not "suppress truthful commercial speech in order to discourage its residents from engaging in lawful activity." *Id.* at 349 (Brennan, J., dissenting). Justice Brennan further maintained that when governments seek to "suppress the dissemination of nonmisleading commercial speech relating to legal activities, for fear that recipients will act on the information provided, such regulation should be subjected to strict judicial scrutiny." *Id.* at 351 (Brennan, J., dissenting). Finally, Justice Brennan maintained that the ban on advertising was unreasonable because Puerto Ricans were not forbidden to gamble at casinos, but were only forbidden to see and hear advertisements about such activities. *Id.* at 353 (Brennan, J., dissenting). In failing to take notice of this fact, Justice Brennan determined that the majority's unquestioning reliance on legislative discretion had given "the government unprecedented authority to eviscerate constitutionally protected expression." *Id.* at 352 (Brennan, J., dissenting).

Justice Stevens, joined by Justices Marshall and Blackmun, further argued that something of a "reverse privileges and immunities problem" was presented in that the Puerto Rican legislature had singled out its own citizens for disfavored treatment in relation to other American citizens. *Id.* at 360 (Stevens, J., dissenting). Justice Stevens further maintained that the majority's proposition that the greater power to forbid casino gambling necessarily includes the lesser power to

The Court utilized similar reasoning in *United States v. Edge Broadcasting Co.*, as the Court held 18 U.S.C. § 1304 applied to the rights of a North Carolina radio station operating near the North Carolina-Virginia border (whose listening audience was composed of more than ninety percent Virginians), which desired to broadcast advertisements for Virginia's state-run lottery.[42] The Court held that supporting the anti-gambling policies of non-lottery states, as well as not interfering with the policies of those states that do, was a substantial government interest.[43] The Court noted *Posadas* with approval, and therefore held that because "the activity underlying the relevant activity—gambling—implicates no constitutionally protected right[,] . . . it falls into a category of 'vice' that could be, and frequently has been, banned altogether."[44] Further, the Court demonstrated great deference to Congress in declaring that there was "*no doubt*" that the government's interests were advanced by the challenged statute.[45] The Court also held that the restrictions were not overly broad because such restrictions must be judged "by the relation it bears to the general problem of accommodating the policies of both lottery and nonlottery states, not by the extent to which it furthers the Government's interest in an individual case."[46] Further, even though some North Carolinians could still be reached by television and newspaper advertisements from Virginia outlets, the statute was still valid because there

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substantially restrict advertising about it was fatally flawed in that "[t]he First Amendment surely does not permit Puerto Rico's frank discrimination among publications, audiences, and words. Nor should sanctions for speech be as unpredictable and haphazard as the roll of a dice in a casino." *Id.* at 363 (Stevens, J., dissenting).

[42] 509 U.S. 418, 423 (1993). North Carolina does not sponsor a lottery. *Edge*, 509 U.S. at 423. As a result, 18 U.S.C. § 1304 allows the advertisements to be broadcast legally from stations in Virginia, though not from stations located in North Carolina. *Id.* at 424.

[43] *Id.* at 426.

[44] *Id.*

[45] *Id.* at 428 (emphasis added).

[46] *Id.* at 430-31. The Court determined that the statute was not remotely effective in this individual case because some 127,000 North Carolinians could potentially be reached by Edge's broadcasts. *Id.* at 431.

is no requirement "that the Government make progress on every front before it can make progress on any front."[47] Justice Stevens, joined by Justice Blackmun, dissented, arguing that the statute constitutes an intrusive and dangerous regulation because it bans truthful speech and promotes ignorance in the public's basic decision-making processes.[48]

E. The Rejection of the "Greater Includes the Lesser" Logic

The Court retreated greatly on the reasoning set forth in *Posadas* and *Edge* with its holding in *44 Liquormart, Inc. v. Rhode Island.*[49] In *44 Liquormart*, an association of liquor retailers brought a declaratory action challenging Rhode Island statutes which prohibited the advertisement of liquor prices on First Amendment grounds.[50] All nine Justices concurred in the judgment that the speech restrictions violated the First Amendment, but none of the reasons for doing so was able to garner a majority.[51] Justice Stevens, joined by Justices Kennedy and Ginsburg, concluded that "special care" should attend state efforts to put blanket bans on commercial speech that is neither deceptive nor concerning unlawful activity[52] because "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."[53] Likewise, Justice

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[47] *Id.* at 433-34.

[48] *Id.* at 439 (Stevens, J., dissenting). Thus, Justice Stevens maintained that to uphold the statute was "to view individuals as more in the nature of captives of their respective states than as free citizens of a larger polity." *Id.*

[49] 517 U.S. 484 (1996). *See* Richard Shawn Oliphant, *Prohibiting Casinos From Advertising: The Irrational Application of 18 U.S.C. 1304*, 38 ARIZ. L. REV. 1373, 1387-88 (1996).

[50] *44 Liquormart*, 517 U.S. at 492-93.

[51] *Id.* at 488-89.

[52] *Id.* at 500.

[53] *Id.* at 501. *See* First Nat'l Bank of Boston v. Belotti, 435 U.S. 765, 795 (1978) (holding that governments cannot regulate speech that poses no threat to asserted substantial interest); Bates v. State Bar of Ariz., 433 U.S. 350, 365 (1977) (noting that best means of keeping public well informed is to open chan-

Stevens pointed out that such complete bans could not be explained solely with appeals to the supposedly "common sense distinctions" between commercial and noncommercial speech.[54] Justice Stevens also determined the precedent in *Posadas* that inferred the Court should "give particular deference to that legislative choice because the state could, if it chose, ban the sale of alcoholic beverages outright . . . [and] because alcoholic beverages are so-called 'vice' products" was no longer good law.[55] Thus, "a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate."[56] Justice Scalia concluded that when political speech is not an issue, the concept of "freedom of speech" must be derived "from the long accepted practices of the American people."[57] Accordingly, he surmised that, since Rhode Island had produced no evidence of such practices, the challenged law was unconstitutional.[58] Justice Thomas concluded that any state interest in manipulating the market choices of consumers is per se illegitimate, regardless of whether or not such speech is deemed commercial or noncommercial, and that the *Central Hudson* test should never be utilized in such cases.[59] Finally, Justice O'Connor, joined by

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nels of communication rather than to shut them and thereby promote public ignorance); Perry v. Sindermann, 408 U.S. 593, 597 (1972) (holding that government may infringe on many personal rights, but may not infringe on constitutionally protected rights like especially freedom of speech).

[54] *44 Liquormart,* 517 U.S. at 502.

[55] *Id.* at 508-09. Justice Stevens was joined by Justices Kennedy, Thomas, and Ginsburg in this particular point of law. *Id.*

[56] *Id.* at 510. *See* Zaudurer v. Office of Disciplinary Counsel, 471 U.S. 626, 648 (1985) (holding that because some members of public may be offended by certain advertising this alone cannot justify suppression of speech at issue); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73-74 (1983) (striking down federal statute prohibiting unsolicited mailing of contraceptive advertisements because children are already exposed to number of such sensitive subjects and regulation was overly broad in trying to reduce entire population to being exposed to only what is fit for children's eyes).

[57] *44 Liquormart,* 517 U.S. at 517 (Scalia, J., concurring).

[58] *Id.* at 518 (Scalia, J., concurring).

[59] *Id.* at 518-19 (Thomas, J., concurring).

Chief Justice Rehnquist and Justices Souter and Breyer, concluded that "[w]hile the state need not employ the least restrictive means to accomplish its goal, the fit between means and ends must be 'narrowly tailored.'"[60] Following on the heels of *Edge* and *44 Liquormart*, the restrictions on gambling advertising at issue in *Greater New Orleans Broadcasting*, were thrown into this environment of uncertainty.[61]

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[60] *Id.* at 529. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417-18 (1993) (holding that challenged restrictions on commercial handbills fell to First Amendment attack because city government had not "carefully calculated" costs and benefits of its imposed burden on speech); Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (holding that within this framework decision on means to achieve legislature's desired end does not have to be perfect, but at least in proportion to interest served); Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989) (holding that restriction at issue must not substantially burden more speech than necessary to further government's substantial interest). The advertising ban in this case was held to be too much of a prohibition because Rhode Island had various other methods (e.g., educational campaigns, purchasing limits, or increasing sales tax on alcohol) at its disposal to accomplish its objective of reducing alcohol consumption. *44 Liquormart,* 517 U.S. at 530.

[61] John J. Walsh and Steven G. Brody, *Supreme Court Should Strengthen Commercial Speech Rights*, *in* 4 No. 1 ANDREWS GAMING INDUS. LITIG. REP. 11 (1999) (arguing Court should apply strict scrutiny to commercial speech and discard *Central Hudson* test). *See* Sean P. Costello, Comment, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After* 44 Liquormart, Inc. v. Rhode Island, 47 CASE W. RES. L. REV. 681, 688 (1997) (forecasting that *Central Hudson* test was on its way out, at least in its then prevailing form); Arlen W. Langhardt and Eric L. Richards, *The Death of Posadas and the Birth of Change in Commercial Speech Doctrine: Implications of* 44 Liquormart, 34 AM. BUS. L.J. 483, 485 (1997) (predicting *44 Liquormart* would lead to narrowing of distinction between commercial and noncommercial speech despite fragmentation of that opinion).

Likewise, in *Valley Broadcasting Co. v. United States*, the Ninth Circuit held that 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211 violated the rights of the plaintiffs, two Nevada television stations that sought to advertise casino gambling which is legal in Nevada. Valley Broad. Co. v. United States, 107 F.3d 1328, 1330 (9th Cir. 1997). The Ninth Circuit was troubled by the numerous exceptions to 18 U.S.C. § 1304, causing it to frame the issue as "whether the existence of these myriad exceptions precludes section 1304 from directly advancing the government's purported interest." *Valley Broad.*, 107 F.3d at 1334. The court held that "what is required is 'a fit between the restriction and the government interest that is not necessarily perfect, but reasonable.'" *Id.* (quoting United States v. Edge Broad. Co., 509 U.S. 418, 429 (1993)). The court looked for guidance in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995), which had held that a federal statute which prohibited the display of alcohol content on beer containers

III. *GREATER NEW ORLEANS BROADCASTING ASS'N V. UNITED STATES*

A. *Opinion of the Court*

In *Greater New Orleans Broadcasting Ass'n v. United States*, the Supreme Court held that federal prohibitions on radio and television advertising for private casinos broadcast from stations in states where such activity is legal violated the First Amendment.[62]

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violated the First Amendment. *Valley Broad.*, 107 F.3d at 1334. In *Rubin*, the Supreme Court cited the failure to make the law applicable to distilled spirits, and the lawfulness of disclosing alcoholic content in advertising but not on labels, as evidence that the statute could not materially advance the government's aim of deterring alcohol "strength wars." *Rubin*, 514 U.S. at 488-89. On this basis, the Ninth Circuit held in *Valley* that 18 U.S.C. § 1304 could not directly advance the government's asserted interest because of the broad exemptions contained in the statute, especially that providing for legal advertising for Indian casinos, which may be broadcast by a radio or television station in any state, regardless of whether that state allows gaming or not. *Valley Broad.*, 107 F.3d at 1336.

Similarly, in *Players International, Inc. v. United States*, 988 F. Supp. 497, 498 (D.N.J. 1997), the plaintiffs, an association of broadcast licensees and a casino operator/developer who wished to either purchase or sell radio and television advertisements for legal casino gambling, brought suit against the United States to prevent the government from enforcing 18 U.S.C. § 1304 against them. *Players Int'l, Inc.*, 988 F. Supp. at 498. The plaintiffs contended "that the FCC's enforcement of § 1304 had 'led to [a] confusing and arbitrary set of unduly restrictive regulations' avowed to control the social harm caused by casino gambling . . . but which are contravened by the 'broad' exemptions which authorize the promotion of particular casino gaming activities." *Id.* at 498. The district court determined that "44 Liquormart rejected *Posadas*' view of state discretion to suppress truthful, non[-]misleading information for paternalistic purposes, and found that in rendering its decision [in *Posadas*] it 'erroneously performed the First Amendment analysis.'" *Id.* at 502. The district court further held that 18 U.S.C. § 1304 was unconstitutional as applied to the rights of the plaintiffs because the government had failed to satisfy the third prong of the *Central Hudson* test, in that there was only mere conjecture about how or if the challenged statute would directly serve the asserted interest in light of the numerous statutory exemptions and the availability to Congress of several alternatives to lower the demand for casino gambling (e.g., educational programs and direct taxes on participation). *Id.* at 506. *See* Edenfield v. Fane, 507 U.S. 761, 767 (1993) (holding that speculation and conjecture alone will not satisfy government's burden of proving challenged statute advances government's interest in material way); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 95-96 (1977) (holding that broad legislative assumptions, standing alone, will not satisfy this burden when other assumptions are just as plausible).

[62] 119 S. Ct. 1923, 1936 (1999). Justice Stevens delivered the opinion of the

The Court first addressed the issue of whether or not the asserted governmental interests were substantial.[63] The Solicitor General argued that the government had two such interests: (1) reducing the social costs resulting from casino gambling and (2) assisting those states that do not allow gambling within their borders.[64] The Court held that it could "accept the characterization of these two interests as 'substantial,' but that conclusion is by no means self-evident."[65] The Court explained that in the judgment of many state legislatures the social ills that the Solicitor General cited were offset or even outweighed by countervailing policies, especially economic benefits.[66] More importantly, the Court determined that Congressional policy in this respect has also reflected "a decision to defer to, and even promote, differing gambling policies in different States. . . . Whatever its character in 1934 when § 1304 was adopted, the federal policy of discouraging gambling in general, and casino gambling in particular, is now *decidedly equivocal.*"[67]

Court, in which Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer joined. *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1926.

[63] *Id.* at 1931. The Court quickly disposed of the first part of the *Central Hudson* test because both parties conceded that the content of the plaintiffs' broadcasts were neither misleading nor about illegal activities. *Id.* at 1930. The Court noted that the broadcasts of the plaintiffs "presumably would disseminate accurate information as to the operation of market competitors, such as payout ratios, which can benefit listeners by informing their consumption choices and fostering price competition." *Id.* Thus, the potential benefit to the public at large could be substantial, even if the interests of the broadcasters in the prohibited advertising was only pecuniary. *Id.*

[64] *Id.* at 1931. The Solicitor General further maintained that gambling contributes to organized crime, bribery, increased drug use, white collar crime, a false sense of economic hope for the poor, and the destruction of families. *Id.*

[65] *Id.*

[66] *Id.* The Court also noted that Congress has enacted various statutes expressing its approval of public and private gambling activities (e.g. exempting Indian gaming activities from the § 1304 restrictions). *Id.* There are a number of exemptions in 47 C.F.R. § 73.1211 from its advertising ban: state-conducted lotteries where the advertising is broadcast from a station in that state, fishing contests, gaming conducted by an Indian tribe, gaming conducted by a non-profit organization, and promotional activities that are "clearly occasional and ancillary to the primary business of that organization." 47 C.F.R. § 73.1211 (1990).

[67] *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1931-32 (emphasis added).

The Court next considered the third and fourth prongs of the *Central Hudson* test: whether the speech restriction at issue directly and materially advances the government's asserted interest, and whether the speech restriction is no more extensive than necessary to serve the government's substantial interests.[68] The Court held that 18 U.S.C. § 1304 could satisfy neither of these standards.[69] The Court determined that "the Government's attempt to minimize the social costs of gambling cannot ignore Congress' simultaneous encouragement of tribal casino gambling . . . ."[70] As a result, the Court held that "[t]he operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."[71] The Court observed that the Government had impermissibly chosen to

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The Court further explained that, though its place is not to weigh various policy considerations reserved for legislatures, it could not "ignore Congress' unwillingness to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General." *Id.* at 1932. The Court determined that this fact alone made the "application of § 1304 become more difficult for the Government to defend." *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 1933. The Government argued that the distinction between tribal and other classes of private casino gambling was justified because of the heavy regulation of the former. *Id.* at 1934. The Court dismissed this contention, declaring that "one would have thought that Congress might have at least experimented with comparable regulation [of private casinos] before abridging the speech rights of federally un[-]regulated casinos." *Id.* Thus, the Court determined that this unreasonable distinction undermined "the asserted justifications for the restriction before us." *Id.* The Court further held that allowing the advertising of private casinos might only lead persons who were *already* gambling compulsively from one casino to another, contrary to the Government's blanket assertion that allowing advertising for gambling would automatically increase demand, and, *a fortiori*, the social costs associated with gambling. *Id.* at 1932-33.

[71] *Id.* at 1933. The Court cited the fact that Indian casinos and government-operated casinos may advertise from media outlets in any state, even if the state where that outlet is located has a broad anti-gambling policy. *Id.* Further, the Court observed that the FCC had irrationally interpreted and enforced the statute in that the FCC had allowed advertisements for commercial casinos if "casino" was part of the proper name of the establishment and the advertisement could be taken to promote the amenities of the casino, as opposed to its gaming aspects. *Id.* Thus, the FCC's interpretation of the statute was "squarely at odds with the governmental interests asserted in this case." *Id.*

target a very narrow segment of the gaming industry "despite the fact that messages about the availability of such gambling are being conveyed over the airways by other speakers."[72] The Court determined that there were many other options open to the Government, such as betting limits or location restrictions, that could assist the Government in advancing its asserted interest without infringing on the truthful and nonmisleading speech at issue.[73]

The Court recognized that though the special federal interest in protecting and providing for the welfare of Native Americans may justify some disparity in the treatment of their commercial enterprises, such differences do not "justify abridging non-Indians' freedom of speech more severely than the freedom of their tribal competitors . . . . the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct."[74] On this point, the Court held that the Government had presented no justifiable reason why the statute should distinguish among similar speech "based on the identity of their owners or operators."[75] Finally, the Court rejected the Government's argument that its interest in promoting the anti-gambling policies of many states would be undermined because some of the plaintiffs' broadcasts could be heard in Arkansas and Texas, where private casino gambling is unlawful.[76] On this issue, the Court determined that 18 U.S.C. § 1304 could not be upheld against the plaintiffs because the statute reflected no policy of attempting to balance the interests of the Government and private interests and attempted to distinguish among the indistinguishable, thereby allowing a considerable amount of commercial speech "that poses the same risk the government purports to fear, while banning messages unlikely to cause any harm at all."[77]

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[72] *Greater New Orleans Broad. Ass'n*, 119 S. Ct. at 1934.

[73] *Id.* at 1934. The Court stated that governmental restrictions on commercial speech must directly and materially advance the government's asserted interest and must not contain a number of exemptions or anomalies that counteract those effects. *Id.* (citing Rubin v. Coors Brewing Co., 514 U.S. 476, 484 (1995)). The Court also cited *Rubin*, for the proposition that a government, if possible, must attempt to advance its asserted interest in a manner which does not put a blanket prohibition on commercial speech. *Id.*

[74] *Id.*

[75] *Id.* at 1935. The Court held that such selective targeting is in serious conflict "with the principles undergirding the First Amendment." *Id.* The Court also stressed that Texas and Arkansas allow tribal casinos, but not private, non-Indian casinos. *Id.*

[76] *Id.*

B. Chief Justice Rehnquist's Concurring Opinion

Chief Justice Rehnquist wrote a concurring opinion, arguing that if Congress were to undertake "substantive regulation of the gambling industry," rather than regulate the way the industry may broadcast its wares, 18 U.S.C. § 1304 would likely be "constitutionally tolerable."[78] Justice Rehnquist determined, however, that the statute, as it then stood, was constitutionally infirm because when Congress undertakes to regulate commercial speech, the *Central Hudson* test imposes a greater standard of review on Congressional judgment than is otherwise applicable to wide-ranging Congressional regulation.[79]

C. Justice Thomas's Concurring Opinion

Justice Thomas, who concurred only in the judgment, continued to adhere to his declaration in *44 Liquormart* that when a "government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," the *Central Hudson* test should not come into play because "such an interest is 'per se illegitimate.'"[80]

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[77] *Id.* The sum result was that the Government's second asserted interest made no more convincing a case for the upholding of the statute than the government's first interest. *Id.* The Court distinguished *United States v. Edge Broad. Co.* on the basis that the Government's asserted interest in *Edge* was to balance the interests of lottery and nonlottery states, not to favor the interests of anti-gaming states alone. *Id.* at 1935 n.8. The Court acknowledged that the case might have turned out quite differently if Congress had adopted a more uniform, coherent policy and sought to accommodate the rights of both gambling and anti-gambling states. *Id.* at 1936.

[78] *Id.* (Rehnquist, C.J., concurring). Chief Justice Rehnquist further declared that this principle held true because Congress "may select one phase of one field and apply a remedy there, neglecting others." *Id.* (Rehnquist, C.J., concurring) (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955)).

[79] *Id.* (Rehnquist, C.J., concurring).

IV. Discussion

The Court in *Greater New Orleans Broadcasting Ass'n v. United States* retained the use of the four-part *Central Hudson* test for assessing the constitutionality of commercial speech.[81] However, that analysis has been significantly transformed in that the Court is now much more willing to scrutinize thoroughly the effectiveness and breadth of governmental restrictions on commercial speech than in cases such as *Posadas*.[82] The Court has not gone so far as to abolish the *Central Hudson* test, as Justice Thomas would advocate, but it is clear that the Court intends to remain ever vigilant in guarding against governmental restrictions and bans on commercial speech when that speech is neither misleading nor concerning unlawful activity.[83] Even Chief Justice Rehnquist, who had originally opposed the usage of the *Central Hudson* test in 1980, is now apparently willing to apply it with a fine tooth comb.[84]

More importantly, *Greater New Orleans Broadcasting Ass'n* also clearly settles any uncertainty that had formerly existed with regard to what level of deference should be accorded a legislative choice to ban or heavily restrict commercial speech.[85] As a practical matter, it likely means that governmental bodies in the future must narrowly tailor any restraints on commercial speech so that they produce specific, tangible results and must be careful not to make broad exemptions, which would serve to undermine the government's asserted interest.[86] Whereas the law had previously been unsettled on the point, particularly prior to *44 Liquormart*, there is now no doubt that the Court will be less tolerant of governmental restrictions on commercial speech with regard to all four prongs of the *Central Hudson* test.[87] Perhaps the only question remaining is whether or not the *Central Hudson* test itself will survive in this area of the law that has changed so dramatically in the last three decades.[88] Even if, contrary to Justice Thomas's wishes, the *Central Hudson* test is not replaced by strict scrutiny, it would be an insignificant point.[89] Because the *Central Hudson* test was applied so arduously by the Court in *Greater New Orleans Broadcasting Ass'n* there can be little chance that any restriction on commercial speech, would fall to either one of those tests without also falling to the other.[90]

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[80] *Id.* (Thomas, J., concurring).

[81] *See supra* notes 27-28, 62, 67-72, 78 and accompanying text.

[82] *See supra* notes 37-40, 71-74, 76 and accompanying text.

[83] *See supra* notes 71-74, 76, 78-79 and accompanying text.

[84] *See supra* notes 35, 78 and accompanying text.

[85] *See supra* notes 37-39, 53-54, 69-73 and accompanying text.

[86] *See supra* notes 69-72 and accompanying text.

V. CONCLUSION

In *Greater New Orleans Broadcasting Ass'n v. United States*, the Supreme Court made clear it will no longer blindly adhere to legislative justifications for laws which put considerable burdens or even outright bans on commercial speech, which is neither misleading nor concerning any unlawful activity. Thus, *Posadas* holding to the effect that a legislature should be accorded considerable deference so long as that body could have reasonably concluded that its speech restrictions would further the government's substantial interest has been categorically overruled. At the same time, the Court also rejected the "greater includes the lesser" proposition, meaning that, in the future, it will likely be substantially harder for legislative bodies to impose restrictions on commercial speech concerning so-called "vice" activities, *even if* that activity could be banned altogether.

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[87] *See supra* notes 34, 40, 45-47, 59 and accompanying text.
[88] *See supra* notes 34, 58, 60, 79 and accompaning text.
[89] *See supra* notes 58, 60, 79 and accompanying text.
[90] *See supra* notes 64-66, 69-73 and accompanying text.